IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

UNITED STATES AUTOMOBILE ASSOCIATION	)(	
	)(	CIVIL ACTION NO.
VS.	)(	2:18-CV-245-JRG
	)(	MARSHALL, TEXAS NOVEMBER 6, 2019
WELLS FARGO BANK, N.A.	)(	8:38 A.M.

TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE CHIEF JUDGE RODNEY GILSTRAP,

UNITED STATES DISTRICT JUDGE

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(Proceedings recorded by mechanical stenography, transcript produced on a CAT system.)

08:38:40 P R O C E E D I N G S

(Jury out.)

COURT SECURITY OFFICER: All rise.

THE COURT: Be seated, please.

Are the parties prepared to read into the record any items from the list of pre-admitted exhibits used during yesterday's portion of the trial?

Please proceed, Mr. Bunt.

MR. BUNT: Yes, Your Honor. The Plaintiff did not introduce any exhibits yesterday.

THE COURT: All right. Let me hear from Defendant in a similar vein.

MR. UNDERWOOD: The Defendants used DTX-174 and DTX-232.

THE COURT: Any objection to that rendition from Plaintiff?

MR. BUNT: No, Your Honor.

THE COURT: All right. Thank you, counsel.

Let me remind everybody present before I bring the jury in, I don't want any distractions or interruptions. I just heard another device make some kind of a noise out there. I've heard that sporadically throughout the trial. If you can't keep your device silent, get up and take it out of the courtroom right now. If this happens while my instructions or closing arguments take place, there are

going to be consequences.

I also don't want anybody in the gallery getting up, moving around, shuffling papers, whispering, leaving the courtroom. This is the most serious part of an inherently serious process. And I expect the highest level of decorum as I instruct the jury and as counsel make their closing arguments. I want to be completely clear about that.

All right. Let me ask counsel, is there anything you're aware of that we need to take up before I bring in the jury and give them my final instructions?

MR. SHEASBY: Nothing from the Plaintiffs, Your Honor.

MR. MELSHEIMER: May it please the Court. Nothing from the Defendant, Your Honor.

THE COURT: And I trust counsel that are going to present closing that no one is going to be dragging easels around or putting up boards or doing anything other than arguing from the screen or the overhead projector; is that correct?

MR. SHEASBY: That is correct for Plaintiffs, Your Honor.

MR. MELSHEIMER: That is correct, Your Honor.

THE COURT: All right. Let's bring in the jury, please, Mr. Johnston.

08:56:56 COURT SECURITY OFFICER: All rise.

08:56:59 (Jury in.)

08:57:00 THE COURT: Good morning, ladies and gentlemen.
08:57:08 Please be seated.

08:57:16 Ladies and gentlemen of the jury, you've now heard
08:57:18 all the evidence in this case, and I will now instruct you
08:57:22 on the law that you must apply.

08:57:29 Each of you are going to have your own printed or
08:57:32 written copy of these final jury instructions that I'm
08:57:34 about to give you orally. You'll have that copy to take
08:57:37 with you to the jury room when you retire to deliberate.

08:57:40 Consequently, if you want to make written notes
08:57:42 now, you are free to, but I want you to understand you'll
08:57:45 have your own written copies of these instructions to look
08:57:48 at once you get to the jury room.

08:57:49 It's your duty to follow the law as I give it to
08:57:54 you. On the other hand, ladies and gentlemen, and as I've
08:57:58 previously said, you, the jury, are the sole judges of the
08:58:02 facts in this case.

08:58:04 Do not consider any statement that I have made
08:58:07 over the course of the trial or make during these
08:58:09 instructions as an indication to you that the Court has any
08:58:13 opinion about the facts in this case.

08:58:16 You're about to hear closing arguments from the
08:58:20 attorneys for the parties. Statements and arguments of the

attorneys, I remind you, are not evidence, and they are not instructions on the law. They're intended only to assist the jury in understanding the evidence and the parties' contentions.

A verdict form has been prepared for you, and you will take this with you to the jury room during your considerations and deliberations, and when you've reached a unanimous decision as to the verdict, you'll have your foreperson fill in your answers reflecting those unanimous decisions in the verdict form. The foreperson should date it and should sign it, and then advise the Court Security Officer that you have reached a verdict.

Answer each question in the verdict form from the facts as you find them to be. Do not decide who you think should win this case and then answer the questions to reach that result.

Again, your answers and your verdict must be unanimous.

Now, in determining whether any fact has been proven in this case, you may, unless otherwise instructed, consider the testimony of all the witnesses, regardless of who may have called them, and you may consider the effect of all the exhibits received and admitted into evidence, regardless of who may have produced or presented them.

You -- you, the jury, are the sole judges of the

credibility of each and every witness and the weight and effect to be given to all the evidence in this case.

As I've told you previously, the attorneys in this case are acting as advocates for their competing parties and their competing claims, and they have a duty to object when they believe evidence is offered that should not be admitted under the rules of the Court.

In the case when the Court has sustained an objection to a question addressed to a witness, you are to disregard that question entirely, and you may not draw any inferences from its wording or speculate about what the witness would have said if the Court had allowed them to answer the question.

On the other hand, if an objection to a question has been overruled by the Court, then you are to treat the answer to the question and the question itself just as if no objection had ever been made, like any other question and answer.

Now, at times over the course of the trial, it's been necessary for the Court to talk to the lawyers, either here at the bench outside of your hearing, or by asking you to retire to the jury room outside of the courtroom.

This happens during a trial, as it did in this trial, because there are things that arise that do not involve the jury. You should not speculate, ladies and

gentlemen, about what was said during these discussions that took place outside of your presence.

Now, there are two types of evidence that you may consider in properly finding the truth as to the facts in this case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, that is, the proof of a chain of circumstances that indicates the existence or nonexistence of certain other facts.

As a general rule, you should know that the law makes no distinction between direct evidence and circumstantial evidence but simply requires that you, the jury, find the facts based on all the evidence presented, both direct and circumstantial.

Now, the parties may have stipulated or agreed to some facts in this case. And when lawyers for both sides stipulate as to the existence of a fact, you must, unless otherwise instructed, accept that stipulation as evidence and regard that fact as proven.

Also, certain testimony in this case has been presented to you through depositions. A deposition is the sworn recorded answers to questions asked to a witness in advance of the trial. If a witness cannot be present to testify in person, then the witness's testimony may be presented under oath in the form of a deposition. And as I

told you earlier, ladies and gentlemen, the attorneys representing the parties in this case questioned these deposition witnesses under oath before the trial began.

At that time, a court reporter was present. The witnesses were sworn and placed under oath. And both sides, through their counsel, had an opportunity to question those deposition witnesses.

Also, you should understand that those portions of those depositions presented to you during the trial are entitled to the same consideration by you and should be considered by the jury just as if the witness was present and testified in person.

You should also know that as to the portions of those depositions presented to you during the trial, both sides had an equal opportunity to contribute to the portions of the testimony that have been played in open court.

Accordingly, you should judge the credibility and importance of deposition testimony to the best of your ability, just as if the witness had appeared in person and testified from the witness stand in open court.

Now, while you should consider only the evidence in this case, ladies and gentlemen, you should understand that you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified

09:04:19 in the light of common experience.

09:04:20 Let me say this another way. You may make
09:04:26 deductions, ladies and gentlemen, and reach conclusions
09:04:29 that reason and common sense lead you to draw from the
09:04:32 facts that have been established by the testimony and the
09:04:36 evidence in this case. However, you should not base your
09:04:43 decision on any evidence not presented by the parties in
09:04:46 open court during the trial.

09:04:47 Now, unless I instruct you otherwise, you may
09:04:50 properly determine that the testimony of a single witness
09:04:58 is sufficient to prove any fact even if a greater number of
09:05:01 witnesses have testified to the contrary, if after
09:05:04 considering all the evidence you believe that single
09:05:06 witness.

09:05:06 When knowledge of a technical subject might be
09:05:10 helpful to the jury, a person who has special training and
09:05:14 experience in that technical field, called an expert
09:05:17 witness, is permitted to state his or her opinions on those
09:05:25 technical matters to the jury. However, ladies and
09:05:28 gentlemen, you are not required to accept those opinions.
09:05:33 As with any other witness, it's solely up to you to decide
09:05:37 who you believe and who you don't believe and whether or
09:05:39 not you want to rely on the testimony of any witness.

09:05:41 Now, certain exhibits have been shown to you
09:05:47 during the trial that were illustrations. We call these

types of exhibits demonstrative exhibits or sometimes simply demonstratives for short.

Demonstrative exhibits are a party's depiction, picture, or model describing something involved in the trial. If your recollection differs from the demonstratives, then you should rely on your recollection. Demonstrative exhibits are sometimes called jury aids. The demonstrative itself, ladies and gentlemen, is not evidence but the witness's testimony during which the demonstrative is used is evidence.

Now, in any legal action, facts must be proven by a required amount of evidence known as the burden of proof. You will apply the burden of proof in this case called the preponderance of the evidence.

The Plaintiff in this case, USAA, has the burden of proving patent infringement by a preponderance of the evidence. USAA also has the burden of proving willful patent infringement by a preponderance of the evidence. Finally, USAA has the burden of proving damages for any patent infringement by a preponderance of the evidence.

A preponderance of the evidence means evidence that persuades you that a claim is more probably true than not true. Sometimes this is talked about as being the greater weight and degree of credible testimony.

This burden of proof, the preponderance of the

09:07:27 evidence, is not to be confused by you with any other
09:07:30 burden of proof. I suspect you've all heard of a different
09:07:35 burden of proof called beyond a reasonable doubt. Beyond a
09:07:39 reasonable doubt is the burden of proof applied in a
09:07:41 criminal case. It has absolutely no application whatsoever
09:07:45 in a civil case like this. And you may have also heard of
09:07:49 another burden of proof called clear and convincing
09:07:52 evidence. This, too, has no application in this case.
09:07:56 Now, in determining whether any fact has been
09:08:00 proven by a preponderance of the evidence, you may, unless
09:08:05 otherwise instructed, consider the stipulations of the
09:08:07 parties, the testimony of all the witnesses, regardless of
09:08:11 who called them, and all the exhibits that have been
09:08:14 received into evidence during the course of the trial,
09:08:19 regardless of who may have produced them.
09:08:21 Now, as I did at the beginning of this case, I'm
09:08:27 going to give you a summary of each side's contentions and
09:08:30 then I'm going to provide you with detailed instructions on
09:08:34 what each side must prove to win on its contentions.
09:08:37 As I told you previously, this case concerns two
09:08:40 United States patents. Those are U.S. Patent No. 8,977,571
09:08:47 and U.S. Patent No. 9,818,090, which you've consistently
09:08:54 heard referred to throughout this trial as the '571 patent
09:08:58 and the '090 patent.
09:08:58 And I will refer to them as the patents-in-suit.

They may also be referred to in these instructions as the asserted patents.

Now, the Plaintiff, USAA, seeks money damages from Wells Fargo, the Defendant, for allegedly infringing the patents-in-suit by making, using, selling, or offering for sale in the United States Wells Fargo's Mobile Deposit system, which I may refer to in these instructions as the accused product.

USAA contends that Wells Fargo's accused product infringes the following claims: Claims 1 through 6, Claim 9, and Claims 12 through 13 of the '571 patent; and Claims 1 through 4, Claim 7, and Claim 10 of the '090 patent.

These claims are sometimes referred to collectively as the asserted claims.

USAA has alleged that the accused product infringes the asserted claims either literally or through the Doctrine of Equivalents.

USAA also alleges that Wells Fargo's infringement is and has been willful.

USAA seeks damages in the form of a reasonable royalty for Wells Fargo's alleged infringement.

Wells Fargo denies that its accused product infringes the asserted claims of the '571 and the '090 patents.

Wells Fargo further denies USAA's allegation that

it willfully infringed any claim of the asserted patents, and Wells Fargo denies that it owes USAA any damages in this case.

Now, ladies and gentlemen, it's your job to decide whether USAA has proven by a preponderance of the evidence that Wells Fargo has infringed any of the asserted claims. If you decide that any claim of the asserted patent has been infringed, you then will need to decide whether that infringement was willful and what amount of money damages, if any, should be awarded to USAA to compensate it for that infringement.

As I've already told you, you will not be asked to decide issues as to the validity of the asserted patents, and you should draw no inference one way or another from the fact that you are not going to be asked to decide issues of validity in this case.

I'm now going to instruct you on a number of establish facts. You -- you must take these facts as true when deciding the issues in this case.

(1) USAA is the record assignee and owner of the '571 and the '090 patents;

(2) the '571 patent was filed for on August the 21st, 2009, and it issued on March the 10th, 2015, by the United States Patent and Trademark Office;

(3) the '090 patent was filed for on December the

28th, 2016, and issued on November the 14th, 2017, by the United States Patent and Trademark Office. The '090 patent has an effective filing date of August the 21st, 2009;

(4) the asserted claims of the '090 patent are Claims 1 through 4, 7, and 10;

(5) the asserted claims of the '571 patent are Claims 1 through 6, 9, and 12 and 13;

(6) USAA's mobile remote deposit product, called Deposit@Mobile, practices the claims of the asserted patents.

Now, before you decide many of the issues in this case, you'll need to understand the role of the patent claims.

Patent claims are the numbered sentences at the end of the patent. The claims are important because it's the words of the claims that define what the patent covers. The figures and the text in the rest of the patent provide a description and/or examples of the invention, and they provide a context for the claims.

But, ladies and gentlemen, it is the claims that define the breadth of the patent's coverage. Each claim is effectively treated as if it were a separate patent, and each claim may cover more or may cover less than any other claim.

Therefore, what a patent covers, in turn, depends

on what each of its claims covers.

You first need to understand what each claim covers in order to decide whether or not there is infringement of that claim. And the first step is to understand the meaning of the words used in the patent claim.

Now, the law says that it is my role to define the meaning of the words used in the claims, but it is your role to apply my definitions to the issues that you are asked to decide in this case.

Accordingly, and as I've explained to you at the beginning of the case, I have determined the meanings of certain words used in the asserted claims, and I have provided these definitions to you in your juror notebooks.

You must accept my definitions of those words as used in the claims as being correct, and it is your job to take these definitions that I have supplied and apply them to the issue of infringement and the other issues in the case.

You should disregard any evidence presented at the trial which contradicts or is inconsistent with the constructions and definitions that I have given you.

For any words used in the claims that I have not construed or defined, you are to use the plain and ordinary meaning of that term as understood by a person having

ordinary skill in the art at the time of the invention.

My interpretation of the claim terms should not be taken by you as an indication that I have a view regarding issues of infringement, willfulness, or damages. The decisions regarding those issues, ladies and gentlemen, are yours alone to make.

I'll now explain to you how a claim defines what it covers.

A claim sets forth in words a set of requirements. Each claim sets forth its requirements in a single sentence. If a product satisfies each of these requirements in that sentence, then it is covered by and infringes the claim.

There can be several claims in a patent. A claim may be narrower or broader than another claim by setting forth more or fewer requirements. The coverage of a patent is assessed on a claim-by-claim basis.

In patent law, the requirements of a claim are often referred to as the claim elements or the claim limitations. For example, ladies and gentlemen, a claim that covers the invention of a table may recite a tabletop, four legs, and nails that secure the legs to the tabletop. In this example, the tabletop, the legs, and the nails are each separate limitations or elements of the claim.

Now, the beginning portion or the preamble of a

claim often uses the word "comprising." The word "comprising," as used in the preamble, means including or containing. And when "comprising" is used in the preamble of a claim, the product that includes all the limitations or element of the claim, as well as additional elements, is covered by the claim.

For example, a claim to a table comprising a tabletop, legs, and nails would be infringed by a table that includes a tabletop, legs, and nails even if the table also includes wheels to go on the ends of the legs.

Similarly, when a patent claims a process comprising several steps, an accused process will infringe that claim if it performs each of those steps, even if the accused product performs additional steps.

For example, a claim to a process for building a table -- table comprising sanding the tabletop and legs, arranging the legs along the tabletop, and nailing the legs on to the tabletop would be infringed by a process of sanding the tabletop and legs, arranging the legs along the tabletop, and nailing the legs on to the tabletop even if the process also includes additional steps, such as painting the tabletop and the legs.

When a product contains or performs all the requirements of a claim, the claim is said to cover that product, and that product is said to fall within the scope

of that claim. In other words, a claim covers a product where each and every element and limitation is present in that product.

If a product is missing even one limitation or element of a claim, the product is not covered by that claim. If the product is not covered by that claim, ladies and gentlemen, the product does not infringe that claim.

Now, there are two types of patent claims, independent claims and dependent claims. This case involves both independent claims and dependent claims.

An independent claim does not refer to any other claim in the patent. An independent claim sets forth all the requirements that must be met in order to be covered by the claim. It's not necessary to look at any other claim to determine what an independent claim covers.

On the other hand, a dependent claim does not by itself recite all the elements of the claim but refers to another claim or claims or some of its requirements. In this way, it depends from or is referred or refers to the other claim or claims.

The law considers a dependent claim to incorporate all the requirements of the claim or claims from which it refers or from which it depends, as well as the additional claims set forth in -- in the dependent claim itself.

To determine what a dependent claim covers, it's

necessary to look at both the dependent claim and any other claim or claims to which it refers or from which it depends. And a product that meets all the requirements of both the dependent claim and the claim or claims to which it refers or from which it depends is covered by that dependent claim.

I'll now instruct you on the specific rules that you must follow to determine whether USAA has proven that Wells Fargo has infringed the asserted claims.

To prove infringement, USAA must persuade you that it is more likely than not that Wells Fargo has infringed the asserted claims.

If a person makes, uses, sells, or offers for sale within the United States or imports into the United States a product that is covered by a patent claim without the patent owner's permission, that person is said to infringe the patent.

Now, in reaching your decision on infringement, ladies and gentlemen, keep in mind that only the claims of a patent can be infringed. You must compare the asserted claims of the asserted patents using my definitions for particular claim elements or language when I have provided such definitions, or if I have not provided a definition, the plain and ordinary meaning of the words as they would have been understood by a person of ordinary skill in the

art to the accused product to determine whether or not there is infringement.

You should not compare the accused product with any specific example set out in the patent or with the patent owner's commercial products or with the prior art in reaching your decision on infringement.

Again, the only proper comparison is between the language of the asserted claims and the accused product.

As I've reminded you during the trial, the only correct comparison is between the accused product and the language of the asserted claims themselves. You must reach your decision as to each assertion of infringement based on my instructions about the meaning and the scope of the claims, the legal requirements for infringement, and the evidence presented to you by both of the parties.

The issue of infringement, ladies and gentlemen, is assessed on a claim-by-claim basis with each patent. Therefore, there may be infringement as to a particular claim within a patent, even if there is no infringement as to another claim within the patent.

I'll now instruct you on the specific rules that you should follow to determine whether the Plaintiff, USAA, has proven that the Defendant, Wells Fargo, has infringed one or more of the patent claims involved in this case.

In order to prove infringement of a patent claim,

09:22:58 USAA must show by a preponderance of the evidence that the
09:23:04 accused product includes each requirement or limitation of
09:23:09 the claim, either literally or under the Doctrine of
09:23:11 Equivalents.

09:23:13 In order to literally infringe a patent claim, the
09:23:17 accused product must include or perform each and every
09:23:21 element of the claim. Thus, in determining whether Wells
09:23:26 Fargo infringes USAA's asserted claims, you must determine
09:23:29 if the accused product contains or performs each and every
09:23:34 element recited in a claim in the asserted patent.

09:23:38 A claim element is literally present if it exists
09:23:43 in or is performed by the accused product as it is
09:23:50 described in the claim language either as I have explained
09:23:53 it to you or if I did not explain it, according to the
09:23:57 plain and ordinary meaning as understood by one of ordinary
09:23:59 skill in the art.

09:23:59 If an accused product, ladies and gentlemen, does
09:24:02 not literally infringe the claim, there can still be
09:24:07 infringement if the Plaintiff, USAA, proves that the
09:24:11 accused product satisfies the claim under the Doctrine of
09:24:15 Equivalents.

09:24:16 Under the Doctrine of Equivalents, an accused
09:24:19 product infringes a claim if it performs steps or contains
09:24:24 elements corresponding to each requirement of the claim
09:24:27 that are equivalent to, even though not literally met, by

09:24:31 the accused product.

09:24:32 You may find that a step or element is equivalent
09:24:36 to a requirement of a claim that is not literally met if a
09:24:41 person, having ordinary skill in the field of technology of
09:24:44 the patent, would have considered the differences between
09:24:47 them to be insubstantial, or would have found that the
09:24:54 structure performs substantially the same function in
09:24:56 substantially the same way to achieve substantially the
09:24:59 same result as the requirements of that claim limitation.

09:25:02 In order to prove that an accused product meets a
09:25:09 limitation under the Doctrine of Equivalents, USAA must
09:25:15 prove the equivalency to the claim element by a
09:25:18 preponderance of the evidence.

09:25:21 Now, you heard reference at times throughout the
09:25:25 trial that the -- that "90 percent (or 95 percent) is an F
09:25:30 in patent law." That's not a correct statement of the law
09:25:34 regarding the Doctrine of Equivalents. There is no
09:25:37 specific percentage requirement, whether it's 90 percent,
09:25:41 95 percent, or any other percentage to satisfy the Doctrine
09:25:46 of Equivalents. Rather, in determining infringement under
09:25:49 the Doctrine of Equivalents, you should apply the
09:25:52 instructions that I have just given you.

09:25:54 However, none of this alters the fact that all of
09:25:58 the elements of a claim must be present either literally or
09:26:02 under the Doctrine of Equivalents for that claim to be

infringed. If even a single element of a claim is neither literally present in the accused product nor present under the Doctrine of Equivalents, then you must find that the accused product does not infringe the claim.

A -- a patent can be infringed even if the alleged infringer did not have knowledge of the patent and without the infringer knowing that its conduct constitutes infringement of the patent. A patent may also be infringed even though the accused infringer believes in good faith that its conduct is not infringement of the patent.

In this case, USAA contends that Wells Fargo willfully infringed its patents. If you decide that Wells Fargo has infringed, then you must go on and separately address the additional issue of whether or not Wells Fargo's infringement was willful.

USAA must prove willfulness by a preponderance of the evidence. In other words, you must determine whether it is more likely than not true that Wells Fargo willfully infringed. You may not determine that the infringement was willful just because Wells Fargo knew of the asserted patents and infringed them.

However, you may find that Wells Fargo willfully infringed if you find that it acted egregiously, willfully, or wantonly. You may find Wells Fargo's actions were egregious, willful, or wanton if it acted in reckless or

09:27:46 callous disregard of or indifference to the rights of USAA.

09:27:48 A Defendant is indifferent to the rights of another when it proceeds in disregard of a high or excessive danger of infringement that was known to it or was apparent to a reasonable person in its position.

09:28:05 You're to determine -- your determination regarding willfulness should incorporate the totality of the circumstances based on all of the evidence presented during the trial. Willfulness can be established by circumstantial evidence.

09:28:19 Now, several times in my instructions I referred to a person of ordinary skill in the field of the invention. It's up to you to decide, ladies and gentlemen, the level of ordinary skill in the field of the invention.

09:28:32 In deciding what is the level of ordinary skill, you should consider all the evidence introduced during the trial including:

09:28:43 (1) the levels of education and experience of the inventors and other persons working in the field;

09:28:49 (2) the types of problems encountered in the field;

09:28:54 (3) The rapidity with which innovations are made; and

09:29:01 (4) the sophistication of the technology.

09:29:04 If you find that Wells Fargo has infringed any of

09:29:08 the asserted claims, you must then consider the proper
09:29:12 amount of damages, if any, to award to USAA.
09:29:15 I will now instruct you about the measure of
09:29:18 damages, however, by instructing you on damages, ladies and
09:29:20 gentlemen, I am not suggesting which party should win this
09:29:23 case on any issue. If you find that Wells Fargo has not
09:29:31 infringed any of these asserted claims, then USAA is not
09:29:33 entitled to any damages. If you award damages, they must
09:29:39 be adequate to compensate USAA for any infringement of the
09:29:45 asserted claims that you may find. You must not award USAA
09:29:48 more damages than are adequate to compensate for the
09:29:55 infringement, nor should you include any additional amount
09:29:57 for the purpose of punishing Wells Fargo.
09:29:59 The patent laws specifically provide that damages
09:30:02 for infringement may not be less than a reasonable royalty.
09:30:09 USAA has the burden to establish the amount of its damages
09:30:13 by a preponderance of the evidence. In other words, you
09:30:14 should award only those damages that USAA establishes that
09:30:19 it more likely than not suffered as a result of Wells
09:30:23 Fargo's infringement of the asserted claims.
09:30:28 While USAA is not required to prove the amount of
09:30:31 its damages with mathematical precision, it must prove them
09:30:34 with reasonable certainty. USAA is not entitled to damages
09:30:39 that are remote or speculative.
09:30:42 A reasonable royalty, ladies and gentlemen, is the

amount of royalty payment that a patent holder and an alleged infringer would have agreed to in a hypothetical negotiation taking place at a time immediately prior to when the infringement first began.

In considering this hypothetical negotiation, you should focus on what the expectations of the patentholder and the alleged infringer would have been had they entered into an agreement at that time and had they acted reasonably in their negotiations.

In determining this, you must assume that both parties believed the asserted claims were valid and infringed and that both parties were willing to enter into an agreement.

The reasonable royalty that you determine must be a royalty that would have resulted from the hypothetical negotiation and not simply a royalty that either party would have preferred.

The law requires that any damages awarded to USAA correspond -- correspond to the value of the alleged inventions within the accused products, as -- as distinct from other unpatented features of the accused product or other factors, such as marketing or advertising or Wells Fargo's size or market position. This is particularly true where the accused product has multiple features and multiple components not covered by the patent or whether

the accused product works in conjunction with other non-patented items. Therefore, the amount you find as damages must be based on the value attributable to the patented technology.

In determining a reasonable royalty, you should consider all the facts known and available to the parties at the time the infringement began. You may also consider:

(1) the royalties received by a patentee for the licensing of the patent-in-suit, proving or tending to prove an established royalty.

(2) the rates paid by the licensee for the use of other patents comparable to the patent-in-suit.

(3) the nature and scope of the license, as exclusive or non-exclusive; or as restricted or non-restricted in terms of territory or with respect to whom the manufactured product may be sold.

(4) the licensor's established policy and marketing program to maintain its patent monopoly by not licensing to others the use of the invention or by granting licenses under special conditions designed to preserve that monopoly.

(5) the commercial relationship between licensor and licensee such as whether they are competitors in the same territory, in the same line of business, or whether they are inventor and promoter.

(6) the effect of selling the patented specialty in promoting sales of other products of the licensee; that existing value of the invention to the licensor as a guarantor of sales of its non-patented items and the extent of such derivative or convoyed sales.

(7) the duration of the patent and the term of the license.

(8) the established profitability of the product made under the patent, its commercial success, and its current popularity.

(9) the utility and advantages of the patent property over the old modes or devices, if any, that had been used for working out similar results.

(10) the nature of the patented invention, the character of the commercial embodiment of it as owned and produced by the licensor, and the benefits to those who have used the invention.

(11) the extent to which the infringer has made use of the invention and any evidence probative of the value of that use.

(12) the portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or analogous inventions.

(13) the portion of the realizable profit that

should be credited to the invention as distinguished from non-patented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer.

(14) the opinion of qualified experts.

(15) the amount that a licensor (such as USAA) and a licensee (such as Wells Fargo) would have agreed upon at the time the infringement began if both had been reasonably and voluntarily trying to reach an agreement. That is, the amount which a prudent licensee, who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention, would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable to a prudent patentee who was willing to grant a license.

Now, ladies -- ladies and gentlemen, no one of these factors is dispositive, and you can and should consider all the evidence that's been presented to you in this case on each of these factors.

You may also consider any other factors that in your minds would have increased or decreased the royalty Wells Fargo would have been willing to pay and that the patent owner, USAA, would have been willing to accept if both had been acting as normally prudent business people.

09:36:35 A reasonable royalty is the minimum amount of
09:36:39 compensation but not the only form of compensation. You
09:36:41 are permitted to consider all the benefits conferred to
09:36:44 Wells Fargo through its infringement of the asserted
09:36:48 patents, including evidence of cost savings that Wells
09:36:52 Fargo has achieved through the use of the asserted patents,
09:36:55 as well as evidence of additional profits and other
09:36:58 benefits. A reasonable royalty can exceed the profits
09:37:02 expected by the patentee.
09:37:06 In determining a reasonable royalty, you may also
09:37:08 consider evidence concerning the availability or lack
09:37:11 thereof of non-infringing alternatives to the patented
09:37:16 invention. You may compare the patented invention to
09:37:21 non-infringing alternatives to determine the value of the
09:37:24 patented invention, including the utility and advantages of
09:37:27 the patent over the old modes or devices, if any, that had
09:37:32 been used to achieve similar results.
09:37:34 Now, as I've already told you, you must not award
09:37:40 USAA any additional amount for the purpose of punishing
09:37:44 Wells Fargo or setting an example.
09:37:46 Additionally, ladies and gentlemen, you must not
09:37:49 consider USAA's allegation of willfulness in considering
09:37:54 damages. Consideration of willfulness is entirely separate
09:37:58 from the question of damages. You may not increase damages
09:38:02 because you find willfulness or decrease damages because

09:38:05 you did not find willfulness.

09:38:08 I will take your decision regarding willfulness

09:38:12 into account later.

09:38:13 Now, in calculating damages, you must consider

09:38:16 whether or not USAA marked its own products that practice

09:38:20 the asserted patents by placing on or within these products

09:38:24 the word "patent" or "pat." and the asserted patent

09:38:30 numbers.

09:38:31 If you find USAA failed to properly mark its

09:38:34 products, then you may only award damages to USAA for

09:38:39 infringement that occurred after the date USAA gave actual

09:38:42 notice to Wells Fargo that USAA believed Wells Fargo was

09:38:49 infringing the asserted patents. It will be up to you to

09:38:52 determine when such notice occurred.

09:38:54 The earliest date from which you may award USAA

09:39:00 damages for infringement of the '571 patent is December the

09:39:03 15th, 2016. The earliest date from which you may award

09:39:08 USAA damages for infringement of the '090 patent is

09:39:12 November the 14th, 2017.

09:39:16 Now, with these instructions, ladies and

09:39:18 gentlemen, we'll proceed to hear closing arguments from the

09:39:22 attorneys in this case.

09:39:25 Plaintiff -- Plaintiff's counsel may present their

09:39:28 first closing argument.

09:39:28 MR. BUNT: Thank you, Your Honor.

09:39:29 THE COURT: Would you like a warning on your time, Mr. Bunt?

09:39:31 MR. BUNT: Yes, Your Honor. Could we have a warning when Mr. Sheasby and I have used 20 minutes?

09:39:34 THE COURT: You may.

09:39:37 Proceed with your closing argument, please.

09:39:38 MR. BUNT: Thank you, Your Honor.

09:39:41 Good morning, ladies and gentlemen. I want to begin by thanking you for your service here over this past week.

09:39:42 I know that we've asked you to be away from your families and from your jobs and your other responsibilities, and I know that we have presented a lot of information to you over the last week.

09:39:48 We lawyers sometimes forget that we have been working on this case for almost a year and a half, but we're asking you to digest all of this information in the space of just five or six days.

09:39:52 I know you've paid careful attention, and I just want to say thank you on behalf of USAA and the whole team.

09:39:56 If I could have Slide No. 1, Mr. Huynh.

09:39:58 You just heard Judge Gilstrap's instructions. One of the things that he told you is that you are the sole judges of the credibility and believability of all the witnesses. And, likewise, you are the sole judge of the

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09:40:39 weight to give that evidence.

09:40:40 And I'd like to take a moment to discuss
09:40:42 credibility for just a moment. And I'd like to note a few
09:40:47 examples of how Wells Fargo's credibility has been strained
09:40:52 throughout this trial.

09:40:54 One of the first things that you heard Wells Fargo
09:40:57 say in their opening statement was that USAA's invention
09:41:01 was not auto capture.

09:41:05 But you'll recall that you heard the testimony
09:41:08 from Mr. Bill Saffici, Wells Fargo's own expert, and he
09:41:16 testified that the patent-in-suit introduced autonomous
09:41:18 monitoring and corrective feedback, and he agreed that
09:41:22 those are referred to in the industry as auto capture.

09:41:24 You also recall the testimony from Mr. Bueche,
09:41:28 USAA's inventor, who testified the same way.

09:41:33 And then you heard the testimony from Mr. Rosati,
09:41:38 Wells Fargo's mobile deposit manager, who did not say that
09:41:40 Wells Fargo was using some special kind of remote deposit
09:41:44 or a different kind of remote deposit. What he told you
09:41:49 was that Wells Fargo's accused product was using what is
09:41:52 commonly known in the industry as auto capture, the same
09:41:57 thing that Mr. Saffici had said was what USAA had come up
09:42:00 with.

09:42:00 If I could go to Slide No. 4.

09:42:04 Another statement you heard from opening statement

09:42:09 was that paper checks are becoming less important. And, in
09:42:14 fact, you heard Mr. Gerardi say this quite a bit just
09:42:18 yesterday.
09:42:19 But you'll recall that Ms. Lockwood-Stein
09:42:21 testified, and she stated that Wells Fargo has processed 3
09:42:27 billion checks during the time frame that Wells Fargo has
09:42:33 been operating the Mobile Deposit -- 3 billion paper
09:42:39 checks. That's how unimportant this is to Wells Fargo.
09:42:42 You've also heard from Mr. Wood.
09:42:46 If I could have the next slide.
09:42:47 And you'll recall that Mr. Wood works at Mitek.
09:42:52 You'll recall that he's not an expert in this case, and he
09:42:55 never ever analyzed the patent claims in this case.
09:42:57 Now, I don't ascribe any ill will to Mr. Wood. He
09:43:03 seemed like a nice fellow, but I want you to recall that
09:43:07 Wells Fargo is Mitek's customer, and USAA did not make
09:43:12 Mr. Wood come to this trial. Mr. Wood came because Wells
09:43:17 Fargo told him to.
09:43:18 Now, at his deposition, when he was giving sworn
09:43:23 testimony, Mr. Wood was asked this question by Mr. Sheasby,
09:43:26 and you can see it on your screens.
09:43:29 Now, I want you to hold the phone, it's looking at
09:43:32 what's called preview mode, correct?
09:43:34 And his answer: Yeah, it's showing -- it's not
09:43:38 capturing. It's a preview.

That was his sworn testimony when he gave his deposition.

But when he came here and got on the stand after he had come all the way from California at the request of his customer, Wells Fargo, and after he'd had a chance to prepare with Wells Fargo's team for his testimony, what did he say when asked this exact same question?

Mr. Sheasby said: When you're holding the phone and looking at what's called the preview mode, it's a preview, it's not capturing, correct?

But the other day on the stand he said: I disagree with that statement.

The exact opposite of what he said in his deposition.

There was something else that Mr. Wood said. You recall that Mr. Sheasby showed him a number of Mitek manuals.

And if you want to take a look at those when you go back to the jury room, you can request those by number. They were PX-92, PX-376, PX-381.

These manuals are things that Mitek sends their software -- they're software development manuals that they send out to their customers. And these manuals explain how their system works, and these manuals describe Mitek's system as capturing after analysis. Monitor first, then

09:45:00 capture.

09:45:01 But what did you hear from Mr. Wood when he came
09:45:04 in here? He told you that you should just ignore what
09:45:08 those manuals have to say. He said that according to him,
09:45:12 those manuals are wrong. The old manuals are wrong. The
09:45:17 new manuals are wrong. The manuals that he's uploaded
09:45:22 since he took his deposition, they're all wrong. When it
09:45:25 says monitor first, capture next, he says that's just
09:45:31 wrong.

09:45:31 As His Honor has pointed out, it's up to you to
09:45:34 decide whether that makes sense.

09:45:35 Now, one thing that Mr. Wood did say that I took
09:45:39 special note of, and I recall that he tried to walk us back
09:45:43 after lunch during his redirect examination, but on
09:45:47 cross-examination, he was asked: You can't point me to any
09:45:51 single document -- any single line of code anywhere in the
09:45:56 world that states capture occurs before the monitoring
09:46:00 criteria are analyzed, correct?

09:46:02 His answer: That's correct.

09:46:04 Now, there's one other issue I want to point
09:46:09 out -- if we could have the next slide -- I think you'll
09:46:12 recall hearing in the opening statement -- I'm sorry, go
09:46:17 back, Mr. Huynh, to the last slide.

09:46:22 You'll hear in the opening statement -- you'll
09:46:29 recall hearing in the opening statement that a 90 is an A

09:46:32 in school but patent infringement it's an F. You're going
09:46:36 to have Judge Gilstrap's instructions. As he told you,
09:46:40 you'll have them back in the jury room with you, and you
09:46:43 can look at those and see exactly where he said that is not
09:46:47 the law for Doctrine of Equivalents. That is not the law.
09:46:51 Wells Fargo began its opening statement by talking
09:46:54 about some simple things that we all learned as kids,
09:46:59 things like putting your socks on before your shoes,
09:47:04 washing your hands before you eat, saying please before --
09:47:11 before you ask for something. Things about timing matters.
09:47:14 And that's important, but USAA believes that there
09:47:16 are some more fundamental matters that we all learned or
09:47:20 should have learned as young children. Values like don't
09:47:26 take things that don't belong to you. Values like if you
09:47:30 do something wrong, own up to it and take responsibility.
09:47:33 Values like words matter, and we need to hold people to
09:47:37 their words.
09:47:38 I ask that you consider these things as you go
09:47:42 back with your deliberations.
09:47:44 And with that, I'll pass this off to Mr. Sheasby.
09:47:47 Thank you very much.
09:47:48 MR. SHEASBY: May it please the Court.
09:47:54 When I was called to jury duty, a question I asked
09:48:00 myself repeatedly was why me? And it's my expectation
09:48:06 throughout these last seven days, you've asked yourself

09:48:09 that question many, many times.

09:48:10 This has been a burden on you personally. For
09:48:14 many of you it's been a burden on you financially, and the
09:48:17 question has to be asked, why you?

09:48:20 Well, there are two answers. The first answer is
09:48:23 because it has to be you because that's what our
09:48:28 Constitution says. And, in fact, in the beginning of our
09:48:31 Constitution, what it says is that we, the people, create
09:48:35 justice.

09:48:36 You are here to deliver justice. It's always had
09:48:41 to be us because that's what our founders intended.

09:48:45 Mr. Huynh, can I have the slides, please?

09:48:48 The second question is why is USAA here. USAA is
09:48:56 made up of 12.4 million armed services members and their
09:49:01 families.

09:49:02 The system that was created in this case was
09:49:04 created to serve them because they live throughout the
09:49:09 world, and many of them live paycheck to paycheck. Their
09:49:13 hard-earned money was spent to create this technology, and
09:49:16 USAA is not going to allow what was described by Wells
09:49:21 Fargo's corporate representative as the largest bank in
09:49:24 history to just take the technology. It's our members'
09:49:29 money, and we're entitled to decide who gets to use it and
09:49:32 who doesn't get to use it.

09:49:33 Now, you've heard the Court's standard of proof

09:49:38 instructions, and the standard of proof instruction is
09:49:41 preponderance of the evidence. And so on every issue, if
09:49:45 the scales tip just slightly for USAA, we prevail. Those
09:49:50 are the rules you must follow, you're obligated to follow.
09:49:55 If the scales tip just slightly, USAA prevails.
09:49:59 We're going to talk about three issues -- the same
09:50:01 three issues we spoke about throughout the trial.
09:50:04 The first is infringement. Under infringement,
09:50:06 there are two types of infringement. There's literal
09:50:09 infringement, but there's also Doctrine of Equivalents
09:50:11 infringement.
09:50:12 And I want to ask yourself how much time
09:50:15 Dr. Villasenor, Wells Fargo's expert in this case, spent on
09:50:19 Doctrine of Equivalents. And the answer is he spent almost
09:50:23 no time.
09:50:23 And I would submit to you there's a reason why he
09:50:27 failed to fairly engage the question of equivalence in this
09:50:30 case, which is a powerful doctrine that you must apply.
09:50:34 There's only one disputed claim element in the
09:50:37 entire case. Every single other claim element was
09:50:40 admitted. Every single one.
09:50:42 Now, when we go to the claims, one of the things
09:50:45 that Professor Conte did -- and I'd actually like Professor
09:50:48 Conte to stand right now. He was from the Georgia
09:50:48 Institute of Technology.

09:50:53 Thank you, Professor Conte.

09:50:54 And he taught us about the claims, and he taught
09:50:56 us about the source code. And if you look at the claims,
09:51:00 you'll see that they talk about source code instructions
09:51:02 "comprising." And that word is very, very important. In
09:51:06 fact, it's so important, you're probably going to want to
09:51:09 underline it in your patent.

09:51:10 And the reason why it's so important is because
09:51:12 what comes below that claim are things that must be
09:51:16 present. You must monitor an image. You must capture an
09:51:19 image. You must provide the image.

09:51:22 But the word "comprising" is a very powerful legal
09:51:25 meaning, and it's on Page 9 of your jury instructions,
09:51:28 which you'll be given, and you can read. Page 9 of your
09:51:32 jury instructions. "Comprising" is a powerful legal word
09:51:35 which means if you have more than what's listed, you're
09:51:39 still infringing. In other words, if Wells Fargo monitors,
09:51:44 if Wells Fargo captures, if Wells Fargo transmits, the fact
09:51:48 that it also does other things is not a defense to
09:51:51 infringement.

09:51:52 So how does this play out? Well, let's talk about
09:51:56 how it plays out with the claim. The claim refers to
09:51:59 comprising. It refers to monitoring, capturing, and
09:52:01 providing. And they dispute the capturing limitation.
09:52:06 They dispute that they capture after monitoring. It's a

very nuanced word game, but that's the argument.

Well, what did Professor Conte point out? Well, he pointed out that the first thing that has to occur is you have to obtain an image.

And if you remember on cross-examination of Mr. Villasenor and then on redirect by their counsel, Mr. Villasenor said the word "obtain" is not in the patent. That was said multiple times through the trial.

But it's not the right law. The word "obtain" doesn't need to be in the patent claims because the patent claims say "comprising."

As long as you analyze a preview frame, which there's no dispute that that's covered by the patent, and I don't think you'll hear any dispute whatsoever from Defendants that analyzing a preview frame is an example of monitoring an image, capturing a check image, then transmit. The fact that you have to first obtain an image to monitor it, that's just common sense.

How are you going to monitor an image if you don't obtain it first? That's exactly what the specification teaches you to do, and it's what that powerful "comprising" language allows and teaches.

You can't get away from our claim just because you obtain a preview image first and then monitor it. That's encompassed by the broad claim.

09:53:24 Mr. Villasenor agreed that those preview frames
09:53:28 that are obtained are only temporary representations of the
09:53:32 video. How can something that's temporary and will
09:53:35 disappear be captured? That's Wells Fargo's argument.
09:53:39 Mr. Villasenor admitted that after the monitoring
09:53:44 criteria are satisfied, only then is the JPEG created.
09:53:48 Now, there's something very nuanced here. Wells
09:53:53 Fargo and Mr. Villasenor are going to argue to you that
09:53:55 creating a JPEG is not capturing an image. That's the
09:53:59 essence of their argument. That's the exact opposite of
09:54:02 what he testified to under oath.
09:54:05 What Wells Fargo does by creating that JPEG from
09:54:09 the preview image is exactly what you do when you have the
09:54:12 camera in front of you, you're looking at preview images,
09:54:15 and then you press capture.
09:54:17 Creating a JPEG is how a digital camera captures.
09:54:23 That's what Mr. -- Dr. Villasenor said.
09:54:25 Now, another interesting fact, an important fact,
09:54:29 for terms that are not construed, you must apply the plain
09:54:32 and ordinary meaning.
09:54:38 The plain and ordinary meaning in this case was
09:54:44 not assessed by Dr. Villasenor. If you'll remember,
09:54:47 Dr. Villasenor never once talked about what the plain and
09:54:50 ordinary meaning of terms were.
09:54:52 There was another expert who did that. That

09:54:54 expert was Mr. Saffici. Mr. Saffici was an RDC veteran.
09:54:59 He was an expert in RDC.
09:55:02 And Dr. Villasenor acknowledged that he was
09:55:03 retained by Wells Fargo to analyze the plain and ordinary
09:55:07 meaning of the claim terms, what the claims cover.
09:55:09 And he admitted something incredibly important.
09:55:13 He admitted that analyzing preview frames, making decisions
09:55:17 as to when those preview frames satisfy the criteria, and
09:55:20 then taking that frame that satisfies the criteria is
09:55:23 covered by the claims of the patent.
09:55:26 So counsel for Wells Fargo has repeatedly said:
09:55:29 Mr. Saffici is not Wells Fargo's non-infringement expert.
09:55:34 Of course he's not their non-infringement expert, because
09:55:37 he admits that the system they use is exactly covered by
09:55:44 the claims of the patent. Of course he's not their
09:55:46 non-infringement expert.
09:55:46 Now, he also said in this express issue when
09:55:49 counsel for Wells Fargo said, well, obtain is not in the
09:55:52 patent, he expressly admitted that taking a frame of a
09:55:56 video, obtaining it from the video and then monitoring it
09:56:00 is an embodiment not just in the specification of the
09:56:02 patent but it's covered by the claims of the patent.
09:56:06 Mr. Wood, the source code. When he was actually
09:56:12 pressed on the meaning of the source code lines, he
09:56:14 acknowledged it. Before the monitoring criteria, you

09:56:17 analyze preview frames. Those preview mode -- looking at
09:56:22 preview frames is not capturing. And then after the
09:56:26 monitoring criteria are satisfied, only then does capture
09:56:29 occur.
09:56:30 Dr. -- Dr. Conte gave a detailed analysis of
09:56:36 Doctrine of Equivalents. It was essentially not joined by
09:56:39 Dr. Villasenor.
09:56:39 Now, I want you to consider the following exhibits
09:56:44 if you have any questions about infringement. PX-92.33,
09:56:52 PX-94.6, PX-376.5, PX-223.8.
09:57:00 Those are the manuals in which again and again and
09:57:06 again Mitek admits that a capture is after the monitoring
09:57:10 criteria are satisfied.
09:57:12 The next issue I'm going to talk to you about is
09:57:14 willful infringement.
09:57:17 Now, you're -- you were instructed by the Court
09:57:21 that you may not compare the USAA system and the Wells
09:57:25 Fargo system for purposes of infringement. And that is
09:57:28 absolutely the case.
09:57:29 But the Court also instructed you that for
09:57:33 purposes of willful infringement, you can consider all the
09:57:35 evidence in the record. You can consider all of it.
09:57:38 And one of the most powerful evidences in the
09:57:41 record for the purposes of willful infringement: Was Wells
09:57:44 Fargo reckless? Was there reckless disregard? Is the

09:57:49 striking similarity between Wells Fargo's system and USAA's
09:57:52 system?
09:57:53 Now, remember, USAA's system practices the
09:57:56 patents. Wells Fargo concedes that USAA's system practices
09:58:01 the patents, and the system that Wells Fargo created does
09:58:04 the exact same thing that USAA's system does. And you
09:58:09 don't have to take my word for it. Mr. Wood said it
09:58:13 himself.
09:58:13 Now, what also is clear from the record and what's
09:58:18 transparently clear from the record is that this wasn't
09:58:23 accidental. They had access to our app. We found
09:58:29 screenshots from the app, from them actually using the app,
09:58:32 and we found screenshots that shows that they knew the app
09:58:35 was covered by our patent.
09:58:38 The next issue I want to discuss is damages. One
09:58:53 of the things that is incredibly important in this case is
09:58:57 to separate out what is in dispute from what isn't in
09:59:02 dispute. Now, in terms of the incredible value of mobile
09:59:08 remote deposit capture, I would submit to you that there is
09:59:10 not substantial dispute about that. It's generally
09:59:13 conceded that mobile remote deposit capture is an
09:59:20 incredible and powerful tool for banks. It saves them
09:59:24 money, it delights customers, it's transformative.
09:59:28 The question and the point of dispute is how much
09:59:30 of that value can be attributed to auto capture? That's a

09:59:35 principal dispute, and the question needs to be answered.
09:59:45 I believe that the record will show that the answer to that
09:59:48 question is $373 million was attributed to the auto capture
09:59:54 system.
09:59:54 THE COURT: 20 minutes have been used, counsel.
09:59:56 MR. SHEASBY: Two other issues, keep in mind that
09:59:59 patents can be incredibly valuable and can be worth
10:00:02 hundreds of millions of dollars. What seems like vast sums
10:00:07 to you and I is common in the patent space when two major
10:00:11 companies are challenged on an issue.
10:00:13 And in this case, as Ms. Lockwood-Stein said,
10:00:20 we're dealing with the largest bank in history. 231
10:00:24 million checks are successfully deposited.
10:00:27 And this is the most important thing, the critical
10:00:30 question for you to answer is what portion of the vast
10:00:33 value of auto capture -- the vast value of MRDC relates to
10:00:38 auto capture. Mr. Gerardi tried to tell you he knew the
10:00:41 answer. And his answer was, oh, it's almost nothing
10:00:45 because we can switch to manual at any time. And he said
10:00:48 that under oath, and he said as support for that that
10:00:52 Dr. Villasenor told him so. But Dr. Villasenor didn't tell
10:00:55 him that. Dr. Villasenor had no opinion on that. The only
10:00:59 evidence in the record from Wells Fargo's experts as to the
10:01:02 value of auto capture is from Mr. Saffici who says it's the
10:01:09 foundation.

10:01:09 I will now speak to you after Defendant's closing.
10:01:13 Thank you, ladies and gentlemen.
10:01:13 THE COURT: Defendant may now present its closing
10:01:15 argument to the jury.
10:01:17 Would you like a warning on time used,
10:01:20 Mr. Melsheimer?
10:01:20 MR. MELSHEIMER: Yes, I would, Your Honor. I
10:01:22 would like a warning when I've used 21 minutes.
10:01:27 THE COURT: All right. You may proceed.
10:01:33 MR. MELSHEIMER: Good morning. I want to start
10:01:34 like everyone else by thanking you for your time. Jury
10:01:37 service is important. We know it's an inconvenience for
10:01:40 you, and we appreciate you being here and paying such close
10:01:43 attention.
10:01:43 We also agree that patent disputes are important
10:01:48 but they're important not simply for the reason that the
10:01:51 Plaintiff has suggested to you. They're important because
10:01:55 it's critical to defend one's self against wrongful claims
10:02:03 of patent infringement. Imagine if you were sitting in
10:02:07 your home that you'd lived in for several years and a
10:02:09 neighbor down the street came up and said this is my home.
10:02:13 Oh, and by the way, not only is it not your home, you owe
10:02:16 me $300 million in rent.
10:02:19 I think you'd do the exact same thing that we've
10:02:23 done, which is said you're wrong, and I'll see you in

10:02:28 court. And that's why we're here. We're here, as I've
10:02:32 said in the beginning, to prove to you that we don't use
10:02:35 any of the patents that USAA has asserted in this case. We
10:02:39 haven't taken any of their technology and we don't owe them
10:02:45 any money, and I think you've seen that in the evidence.
10:02:47 And I'm going to start with the evidence. I'm
10:02:49 going to start with the evidence, because I told you at the
10:02:51 beginning that we would bring you the evidence. And what
10:02:54 did we bring you? What was the first witness we brought
10:02:57 you?
10:02:58 A gentleman from Mitek named Andrew Wood. Now,
10:03:02 Mr. Wood was a software engineer. He grew up wanting to be
10:03:07 a software developer. He supervised a team of developers
10:03:10 that wrote the MiSnap source code which is at issue in this
10:03:14 case. And he came here and he explained it to you in some
10:03:17 detail.
10:03:19 We asked him, is there more than one way to do
10:03:23 auto capture? And this is important. The Plaintiff in
10:03:26 this case has tried to suggest to you that they've cornered
10:03:29 the market on auto capture, that there's only one way to do
10:03:33 it, and it's their way.
10:03:35 Well, that's not true. The evidence has shown, as
10:03:37 you heard from Mr. Wood, that there are multiple ways to do
10:03:40 auto capture because they have done it multiple ways in
10:03:44 their own software.

10:03:46 Let me show you a timeline that summarizes what
10:03:49 Mr. Wood told you and some other evidence in the case.
10:03:53 First, we know that in May of 2012, Wells Fargo
10:03:58 launched the manual remote deposit product. In May of
10:04:05 2014, Wells Fargo added this auto capture feature that
10:04:08 Mitek offers called MiSnap.
10:04:13 Now, we also know from Mr. Wood that in September
10:04:16 of 2014, Mitek changed the auto capture method to a capture
10:04:24 first method, then monitoring, because of improved camera
10:04:29 quality which I'll explain in a minute.
10:04:32 So from September 2014 on, Mitek's software was
10:04:36 doing what's called video frame processing, before they had
10:04:41 done what he called video still capture, and finally note
10:04:45 that the first patent in this case, the first Plaintiff
10:04:51 patent in this case, the '571, did not issue until March of
10:04:54 2015.
10:04:54 Now, why did they make the change in the Mitek
10:04:59 code in September of 2014? And by the way, no one's
10:05:02 disputed this. There's been no witness or suggestion that
10:05:06 this code wasn't changed, that what Mr. Wood told you
10:05:09 wasn't accurate. He's the person that knows the code and
10:05:13 supervises the code writers.
10:05:15 And we asked him, what was the main reason?
10:05:18 And he said there were two reasons. One is that
10:05:21 we were getting feedback that some of the images in the old

10:05:23 way we were doing auto capture were blurry. And then, two,
10:05:27 the second reason was that phone cameras were better. And
10:05:32 this is also in our own experience from using phones. We
10:05:35 know that the cameras on phones have gotten better over
10:05:39 time, and Mitek wanted to take advantage of that. We
10:05:44 didn't need to capture a high res image. We had one that
10:05:50 was good already.
10:05:51 So what did Mr. Wood come in here and do? He went
10:05:54 in and explained from Defendant's Exhibit 611, and you can
10:05:57 ask for this. This is the code. This is the code that he
10:05:59 walked through starting with code lines 2278, 2279, and
10:06:06 2280. That is the captureOutput, the AVCaptureOutput, and
10:06:16 then much later in the code 2322, many lines down, that's
10:06:18 where they do the analysis.
10:06:19 Now, they just suggested to you, well, we asked
10:06:23 Mr. Wood and he couldn't point to a single line of code.
10:06:26 Folks, because he pointed to multiple lines of code. He
10:06:29 showed you how the code worked. He showed you what that
10:06:33 first code was doing, the capturing, and he showed you
10:06:36 later on in the code when it was doing the monitoring or
10:06:38 the analysis.
10:06:39 Now, let's go back to the chronology for a moment.
10:06:46 Remember in the old way that Mr. Wood explained to
10:06:49 you was called video still capture where they didn't
10:06:52 capture first in the old way. And he told you that the

10:06:57 manuals described the old way, and they were accurate at
10:06:59 one time, but he also told you that they hadn't been
10:07:03 updated to reflect what -- the change that had occurred in
10:07:09 September of 2014. Now, you just heard from the Plaintiff
10:07:14 that those manuals are so important. But that's not what
10:07:17 their expert told you. Their expert told you that what's
10:07:19 important is the code.
10:07:21 Dr. Conte says if you've got a conflict between
10:07:25 the manuals and the code, you look at the code because the
10:07:29 code trumps any descriptive document. The source code
10:07:34 controls how this software works, not how someone says it
10:07:39 works, not what a manual says. But, remember, the only
10:07:43 person with personal knowledge of the source code that came
10:07:46 into court and took an oath was Andrew Wood. Andrew Wood
10:07:54 told you that, he told you how it worked, and he showed
10:07:54 you, not one line, the specific lines of code in
10:07:58 Exhibit 611.
10:07:58 Now, let's return to that code. What does he say?
10:08:01 At a high level, the iPhone camera has just captured some
10:08:05 output, 2278, captureOutput, and has sent this to MiSnap.
10:08:13 It's sending an image that was captured to MiSnap. Mitek
10:08:17 takes that image and then it analyzes it and tries to
10:08:19 determine if it thinks it's a good image or not.
10:08:22 Folks, that's capturing, then monitoring.
10:08:24 Capturing then monitoring. That's a different way than

what these patent claims describe. That's the new way.

It was confirmed by Dr. Villasenor who was asked: Hey, you heard Mr. Wood. Is your understanding of the code consistent with what you heard from him?

He says: Yes, it is.

Then he went -- Dr. Villasenor went and compared the patent claims to the Wells Fargo products.

So on the left-hand side, you've got the patent claims, the '571, 1 to 6, 9, 12, and 13; the '090, Claims 1 to 4, 7 to 10 [sic].

They do two things. They -- one, they monitor the image. That's the first thing they do in the patent claims, and then they capture.

Now, Dr. Villasenor told you quite plainly, that's not what the Wells Fargo products do. The Wells Fargo products operate by capturing before the analysis.

So that is exactly the opposite of the order that's required by both the language of the claim and in the Court's construction.

Now, folks, again and again in this trial and in the time I have with you, we're going to focus you on the claim language because Judge Gilstrap has told you time and again in these instructions, the claims are important because it is the words of the claims that define what a patent covers.

10:09:49 This is important. The figures and the text in
10:09:54 the rest of the patent provide a description and/or
10:09:57 examples, but it is the claims that define the breadth of
10:10:00 the patent coverage, not anything else.
10:10:02 Only the claims can be infringed. You don't look
10:10:06 at the specification and say, that's patent infringement.
10:10:09 You look at the words of the claims.
10:10:12 And he also told you that you cannot -- for
10:10:15 infringement, you cannot compare the accused product with
10:10:19 anything in the specifications, nor can you compare the
10:10:24 patent owner's product.
10:10:26 So when they try to show you their product, they
10:10:29 can have any kind of a product they want to. That's not
10:10:31 the analysis. You have to compare the words of the claim,
10:10:35 the order of those words, and you compare that to what
10:10:40 Wells Fargo does. And as Dr. Villasenor told you, we do it
10:10:43 just the opposite.
10:10:44 It's true, it's not 90 or 95 percent, as the Court
10:10:48 has instructed you. It's all the elements of the claims
10:10:52 must be present. Not some, not most, not many. They all
10:10:56 have to be present whether it's literal infringement or the
10:11:01 Doctrine of Equivalents. And if one element is missing
10:11:05 under any theory of infringement, there's no patent
10:11:09 infringement.
10:11:09 That is why we've brought you back to the claims.

10:11:15 MiSnap does not capture at or after. The patents are
10:11:20 monitor/capture. MiSnap is capture, then monitor.
10:11:25 Claim 1 of the '090, at or after the monitoring
10:11:31 criterion are satisfied, then you capture. That's the
10:11:35 claims. That's the exact opposite of what the Mitek
10:11:41 product in the Wells Fargo system does.
10:11:42 The Plaintiff brought you a lot of evidence to try
10:11:44 to confuse the issues and suggest things that were not
10:11:48 accurate. They brought you the inventor, and you might
10:11:52 think the inventor would be an important witness.
10:11:55 But Mr. Bueche, when he was asked: You didn't
10:11:58 talk about the claims during your testimony, did you?
10:12:00 The information I provided came from the
10:12:04 specifications.
10:12:05 What do we know from Judge Gilstrap's
10:12:08 instructions? You can't infringe the specifications. You
10:12:10 have to look at the language of the claims and compare them
10:12:14 to the product.
10:12:14 Now, what did they bring you? What's their
10:12:17 evidence?
10:12:18 Now, they started out their opening statement
10:12:20 attacking things that we had said. They didn't start out
10:12:23 showing you what their evidence was. What was the proof
10:12:28 that they brought you? And I submit to you, they did not
10:12:31 bring you the greater weight of the credible evidence on

what they have to prove.

First, they tried to expand their patents beyond the claims.

Remember Mr. Calman's testimony. I asked him this question.

Back in October of 2017, didn't you prepare a report that had this statement: Principal developer on Merrill Lynch app, comma, first mobile deposit app to automatically take a photo of a check image -- of a check for image check deposit. Did I read that correctly?

And he said: Yes, sir, but this isn't auto capture as we've been discussing it.

What is the only thing that can mean? That there's other kinds of auto capture. He says Merrill Lynch had the first kind of auto capture, and that's different from what he says he's talking about here.

They also tried to point to you to the app and what the app looked like and the fact that we had pictures of their app in our files.

Mr. Bueche was asked: Are you saying the website gave you information about the operation of the Wells Fargo product, that we had information on our website about how our product worked?

He said: Yes, it described how auto capture worked.

10:13:51 But then when he got on the stand, he had to
10:13:55 admit, that's not true.
10:13:56 Did you feel like the website gave you an
10:14:01 understanding of the technical operation of the Wells Fargo
10:14:03 product?
10:14:03 It had no insight into the technical operation of
10:14:07 the product.
10:14:07 And the technical operation, folks, is the source
10:14:10 code. That's why we brought you Mr. Wood, who had great
10:14:13 personal knowledge of that code.
10:14:14 They did bring you one infringement expert, not --
10:14:20 they brought you Dr. Conte. And I'm going to submit to you
10:14:23 that his theory was not based on the claim language, and it
10:14:29 simply made no sense. This is what he told you in
10:14:32 Paragraph 412 of his report:
10:14:34 A JPEG image is created and transmitted via
10:14:38 communication network to Wells Fargo's servers where the
10:14:42 check image is stored. This is the first and only time
10:14:46 that the check image is captured in the Wells Fargo system.
10:14:51 This is what he's talking about. So there's got
10:14:55 to be a JPEG image, it's -- and it's got to be transmitted
10:14:58 to Wells Fargo's servers. That's what he says is captured.
10:15:00 Now, that doesn't make any sense at all. We asked
10:15:07 Dr. Conte: Does JPEG have anything to say about
10:15:11 infringement?

10:15:13 And he says: No. Converting an image to JPEG is
10:15:16 not capturing because in order to create a JPEG image, you
10:15:20 have to have something to convert in the first place. You
10:15:25 have to have an image or some data or something to convert.
10:15:28 You have to have something that you've captured before you
10:15:31 can convert it.
10:15:32 Mr. Wood told you the same thing. You can't
10:15:35 compress something without having it. You can't compress
10:15:40 something that you haven't already captured.
10:15:42 Of course, the patent claims say nothing about
10:15:45 JPEG. We asked Dr. Conte this. The patent claims say
10:15:51 nothing about volatile or non-volatile memory.
10:15:55 Remember, this is his story that he gives. He
10:15:57 says: Well, yeah, it's on the camera, but it's not really
10:16:01 captured until it's sent to the server. Could be a hundred
10:16:04 or a thousand miles away where it's kept in permanent
10:16:07 memory or non-volatile memory.
10:16:10 But the claims of the patents don't contain the
10:16:12 words "volatile" or "non-volatile" memory. They don't.
10:16:16 He also tried to make this point about obtain.
10:16:19 You just heard it from counsel for the Plaintiff. Obtain
10:16:22 is not in the claims of the patent either. And, of course,
10:16:24 we know that the claims say nothing about storing
10:16:28 information on a server as being part of capture.
10:16:31 Ladies and gentlemen, Dr. Conte's theory was so

absurd and nonsensical, that he couldn't even keep it straight himself.

What did he say in his report? This is Paragraph 83. How did he lay it out? Image capture first, threshold checking second. Folks, that's capture, and thresh -- IQA is image quality analysis.

And he tried to say, well, that wasn't the order I meant. That wasn't what I intended. Folks, the order is the most important thing in this case. You've heard about it from Day 1. This man paid to write and analyze this. He couldn't get his own theories straight because it's plain as day that what Mitek does is capture first and then analyze, which is exactly the way he put it.

And, of course, he couldn't really explain the code to you like Mr. Wood did.

And the code that you saw in 611, the first three lines there, 2278, 2279, 2280 are captured.

And by the way, remember, you see that "void" language. Remember what Dr. Conte told you, that doesn't mean nothing happens there. That doesn't mean ignore it. It means something is happening. And what's happening, I submit to you, is capture is happening in those first lines of 611, captureOutput, AVCaptureOutput, and the analysis is occurring much later in the code.

I want to talk briefly about smoke screens that

you've heard in the case and I think are distractions from the truth and distractions from the proof that we aren't infringing any patents and we aren't doing their version of auto capture.

First, Mr. Saffici. You heard about him over and over again. Let me tell you some things that will not be disputed. He did not analyze infringement. He never ever compared the claims of the patent to the Wells Fargo product. They have never shown you that. It never happened. They never played it. It did not happen. He never did the analysis that Dr. Villasenor did and that you're going to have to do.

And the language that he used, what they played for you involved language that did not include the claim language that we're talking about here. Only Dr. Villasenor performed the non-infringement -- non-infringement analysis that is critical in this case.

Another smoke screen is this notion that, well, it's close enough. Because we don't have literal infringement maybe -- yeah, maybe you've got us on that ordering of the steps. Maybe -- maybe your product captures first instead of monitors, but it's close enough because of this doctrine called the Doctrine of Equivalents, which the Judge has charged you on.

Folks, that is not horseshoes or hand grenades.

That is not an excuse to not prove all the elements.

The Judge tells you none of this alters the fact that all of the elements of a claim must be present. All of the elements must be present whether it's literal infringement or Doctrine of Equivalents.

And I submit to you that there's simply no way that you could conclude when the Mitek/Wells Fargo system is capture, then analyze, and the patents are analyze, then capture, that's not equivalent. That's a substantial difference. It's not the same way of doing it. It doesn't have all the elements, and, therefore -- therefore, there's no infringement under either theory.

The final smoke screen I want to talk about is this notion of these screenshots. This is Plaintiff's Exhibit 1182.

You heard over and over again that in April of 2018, there were screenshots of the app that USAA had found at Wells Fargo.

Now, first of all, we've been told from the Court again and again, you don't look at their product and compare it to the Wells Fargo/Mitek product for infringement. You look at their claims and compare it to the product. And we know that shows there's no infringement.

But even their own witnesses have to admit that

10:21:05 this is not relevant. I asked Mr. Calman: Do you
10:21:10 understand that the patents in this case do not involve how
10:21:13 one program looks versus how another program looks? Do you
10:21:19 understand that, Mr. Calman?
10:21:21 And he said: Well, yeah, the patents are not
10:21:25 about the aesthetics. They're about how the program -- how
10:21:29 the system works.
10:21:31 And you know how the system works not from how the
10:21:37 pictures look, not from what the manuals say, but from the
10:21:43 source code.
10:21:44 Dr. Conte admits the source code trumps. Mr. Wood
10:21:48 is the only person that testified with personal knowledge
10:21:51 of the source code. And Dr. Villasenor showed you how the
10:21:56 Mitek/Wells Fargo system does not align literally or with
10:22:02 equivalents with the claim language. And that means
10:22:04 there's no infringement.
10:22:05 So as I said last week, we've all heard the phrase
10:22:13 "timing is everything." That's true sometimes in life, and
10:22:18 it's true all the time in these patents. And because
10:22:23 timing is everything, because order matters, and it's the
10:22:29 claims that matter, we don't infringe the '090 or the '571,
10:22:36 any of the patents in the case.
10:22:37 I'm going to yield the balance of my time to my
10:22:41 colleague, Mr. Hill. Thank you. Thank you for the time
10:22:44 and attention that you've devoted to this case.

10:22:52 THE COURT: You may proceed, Mr. Hill.

10:22:53 MR. HILL: Thank you, Your Honor.

10:22:54 Good morning, ladies and gentlemen.

10:22:56 You have just heard Mr. Melsheimer review with you the evidence that we have proved in this case that establishes that Wells Fargo Bank's product does not infringe these patents, that the Plaintiff in this case has not carried their burden of proof, burden of proof, not hope, not suggestion, proof.

10:23:20 Now, I want to walk you through the verdict form that you guys are going to see here in a little while -- that you folks are going to see here in a little while from the Court. It's got specific questions that you're going to have to answer, and in the context of that verdict form, I want to cover a few of the other issues that are in the case.

10:23:38 Now, as I mentioned, the Plaintiff, the Plaintiff, USAA, has to prove by a preponderance of the evidence the greater weight of the credible evidence. They have to prove that Wells Fargo has infringed.

10:23:54 As you've heard, Wells Fargo Bank's Mitek software captures the image and then analyzes it. Thus, USAA cannot prove infringement of every element of any claim literally or under the Doctrine of Equivalents.

10:24:12 And as the Court has told you, all elements of the

claim must be present.

Ladies and gentlemen, that is the first question of the verdict form you're going to see. We suggest to you that the answer to Question 1 is no, is no. They have not proven by a preponderance of the evidence infringement in this case.

Now, folks, if you answer no to Question 1, you don't even get to Question 2, but because it's in the Court's verdict form, I have to discuss it with you. So we're going to move on to Question 2.

It asks: Did USAA prove -- again, prove by a preponderance of the evidence that Wells Fargo has willfully infringed any of the asserted claims, if you have found them infringed?

Ladies and gentlemen, as Mr. Melsheimer just explained to you, our product -- our auto capture product had been on the market for over a year before USAA even obtained a patent that's in this case. We had it out before they had patented technology.

Ladies and gentlemen, you've also seen that we demonstrated to you why we don't infringe, why experts that we have consulted have advised us you don't infringe. Folks, that alone, those two facts alone defeat willfulness. They defeat willfulness. We were proceeding as a legitimate business should by going out and paying

for -- buying from a legitimate venture the services and the technology that we needed to use and putting that on the market. And we did it before USAA ever even had a patent in this space.

They have to show for purposes of willfulness that we did something wantonly or egregiously. Folks, all we did is fairly compete.

They want to make noise about copying. They want to suggest to you based on these screenshots that don't tell you anything about the source code that we had copied their product somehow. But, folks, if we look at the clips from their own witnesses, Mr. Bueche, he had to admit there's no evidence of copying in this case.

Mr. Prasad, another inventor on the patent, he had to admit there's no evidence of copying in this case.

And ladies and gentlemen, they put an exhibit in evidence that tells you exactly what you need to know about how Wells Fargo took their claims seriously and tried to discuss them with USAA. They put in Plaintiff's Exhibit 162. They suggested to you it said something it didn't. You'll have a chance to examine it in the jury room. What you will see is that we tried to investigate and have a discussion with USAA, and before that discussion could conclude, we were sued.

Ladies and gentlemen, the third question on the

verdict form deals with damages. I want to go there now.

Now, again, this question asks: What amount of money has USAA proven -- proven by a preponderance of the evidence, not hoped for, not suggested to you, what have they proven by the credible weight of the evidence?

Ladies and gentlemen, I would suggest to you they haven't proven anything because you don't answer this question if you find no infringement. We believe the answer to this question is zero and that we don't infringe, and that's why it's zero.

But, ladies and gentlemen, I want you to consider what USAA is saying here because what they say in the damages context I think tells you a lot more about them than it does anything else in the case.

They are asking you, if you look at this question on the verdict form, they are asking you for $300 million for the time period of December 2016 through trial, resulting from infringement through the date of trial. I don't know if they ever really made that clear to you in the presentation of the evidence. They said $300 million. It may have taken you aback. But did they emphasize that that's $300 million only for three years' use of these patents? Think about that. Think about that.

They were bashful to draw that out, to make clear to you that they're talking about $300 million for just the

10:28:59 past three years.

10:29:01 Folks, it's unreasonable on its face. It's
10:29:05 unreasonable on its face.

10:29:06 And it's particularly unreasonable considering
10:29:10 that Mr. Weinstein had to admit in his testimony that the
10:29:15 availability of manual capture as an alternative, as a
10:29:20 non-infringing alternative, that availability caps the
10:29:23 damages. It caps the damages.

10:29:26 And as Mr. Gerardi calculated appropriately, if
10:29:29 you look at the actual value of not all of MRDC, that's
10:29:33 what they're trying to do. They're trying to grab this
10:29:37 historical value of mobile deposit generally and they're
10:29:40 trying to take credit for it and say that's what we're owed
10:29:45 for just this three-year period. Folks, they didn't invent
10:29:48 that, they aren't entitled to that, and what Mr. Weinstein
10:29:52 was admitting here is that Mr. Gerardi's calculation of
10:29:56 what -- if you have a non-infringing substitute, what the
10:29:59 amount is, that serves as a cap at that hypothetical
10:30:02 negotiation.

10:30:02 Mr. Weinstein had to show you that no bank gets
10:30:10 great benefit out of these patents. Wells Fargo gets no
10:30:13 great benefit out of this technology that they claim that
10:30:17 we're using. Because what he had to show you was that all
10:30:20 it would amount to is a few checks per branch per day.
10:30:24 Folks, no bank is ever going to pay $300 million, what USAA

10:30:28 is asking for in this case, for a few checks per branch per
10:30:32 day for a three-year period.
10:30:34 They tried to put in front of you this shell game
10:30:41 consistently where they would suggest to you the value of
10:30:44 total mobile deposit and try to conflate that with their
10:30:48 narrow auto capture invention. Their narrow invention of
10:30:51 the difference between this or just this. That's what
10:30:56 their patents cover.
10:30:57 And so they tried to show you testimony from Wells
10:31:00 Fargo witnesses. You remember the deposition even
10:31:02 yesterday they were -- they were adding with Mr. Ajami's
10:31:06 deposition, a Wells Fargo employee who they repeatedly
10:31:10 asked about is mobile deposit table stakes? Does mobile
10:31:14 deposit have this great big value? And, of course, he said
10:31:17 yes. He's not talking about their invention. But that's
10:31:20 what they're trying to capitalize on.
10:31:25 Folks, their own inventor had to admit to you that
10:31:30 what they're asking is unfair. We asked Mr. Bueche:
10:31:36 Mr. Bueche, would it be unfair for USAA to come to court
10:31:42 and try to get money for things that these patents didn't
10:31:45 invent?
10:31:45 And he conceded the point.
10:31:48 Ladies and gentlemen, Wells Fargo has built its
10:31:55 success fairly and by the hard work of its employees and by
10:31:58 lawfully building its technologies or lawfully buying its

technologies from vendors who sell them.

Folks, our Constitution protects more than just patents as the Plaintiffs would suggest to you. It protects the freedom to compete lawfully.

That's what Wells Fargo is standing up for in this case, ladies and gentlemen, the freedom to compete lawfully by doing the right thing of buying what it is you want to use in your business, but then when you're accused wrongfully of infringing a patent and unreasonable demands are made upon you for money at a courthouse. You stand up to that. And that's what we've done here.

Folks, you've seen the evidence, you've heard the requirements of the law, and now we ask that you as jurors do what you took an oath to do, which is to render justice, to consider all of the facts, and we ask that after considering all the credible evidence that you stop this overreach and that you return a verdict in favor of Wells Fargo.

I thank you for your time and we thank you for your attention. And we look forward to your verdict.

Thank you, Your Honor.

THE COURT: Plaintiff may now present its final closing argument. You have 18 minutes and 33 seconds remaining, Mr. Sheasby. Would you like a warning on your time?

10:33:22 MR. SHEASBY: I would like a warning at seven
10:33:25 minutes, Your Honor.
10:33:25 THE COURT: Seven minutes remaining or seven
10:33:27 minutes used?
10:33:28 MR. SHEASBY: Seven minutes remaining.
10:33:29 THE COURT: All right. I will warn you, proceed.
10:33:31 MR. SHEASBY: The patents in this case were filed
10:33:33 in 2009. Wells Fargo did not launch its system until after
10:33:38 USAA launched its mobile remote deposit capture system.
10:33:42 USAA was first, and Wells Fargo had an obligation under the
10:33:44 law to remove itself from our property when the United
10:33:50 States Patent Office granted us a patent in 2015.
10:33:52 Let's go to Slide 47.
10:33:55 One of the things that USAA is really focused on
10:34:07 in this case is evidence, and what you'll see is the
10:34:11 following:
10:34:12 Wells Fargo was speaking about the fact that Mitek
10:34:17 had two versions of auto capture, and it had a video
10:34:22 capture mode, which was the old mode before 2014, and then
10:34:26 it had a new mode called video frame processing. That's
10:34:29 the mode that's at issue in this case, and what video frame
10:34:32 processing is, they say, is not auto capture.
10:34:34 Well, the manuals say something different, because
10:34:37 that mode after 2014, if you look at the manual, it says
10:34:42 automatic capture when good image is detected. The exact

operation of the claim language.

Let's have Slide 40.

Now, US -- Wells Fargo is basing the vast majority of their infringement case on the word of Mr. Wood, but there's something interesting about Mr. Wood. Not only was he not an expert, not only did he not analyze the patent, he admitted something incredibly important. He admitted that whatever use he's making of the word capture, it's different from how the Mitek manuals use it, and obviously it's not how the patent uses it because he hasn't read the patent.

So Wells Fargo put someone on the stand without reading the patent who has some secret definition of the word "capture," which he didn't tell you and he didn't tell me and is different from his company's, and they're trying to use that to establish non-infringement.

Let's go to Slide 40.

Let's go to Slide 46, excuse me.

The idea that the manuals stopped being released after they changed their system has no connection to reality. Mr. Wood admitted multiple times that after his deposition, Mitek continued to release manuals establishing infringement.

Let's go to Slide 38.

This is, I think, one of the most important

aspects of the case, which is Professor Conte promised that he would teach you, and they're very, very focused on this beginning of the code.

And what Professor Conte says and what he taught is that it was the beginning of a chapter, and it was telling you what's going to happen in this chapter. And now, was it absolutely the case that in this chapter, (void) captureOutput the end result of that is the capture, but you have to get to the end of the chapter.

Let's have Slide 39.

Professor Conte explained to you what's in this chapter before the monitoring criteria -- let's build it all, Mr. Huynh -- before the monitoring criteria, there is obtaining a preview frame, next, please, there is analyzing the frame using criteria, there is check if the frame passes this criteria, and then after the monitoring criteria, there's capture. That's what the -- the story in the chapter tells you, and that's what establishes infringement.

Let's have Slide 32, please.

I keep coming back to Wells Fargo's plain and ordinary meaning expert who described the exact system that is at issue in this case as infringing. And Mr. Villasenor admitted he doesn't disagree with that.

Can we have Slide 25?

10:37:40 What Mr. Villasenor admitted is what Wells Fargo's
10:37:47 counsel described as some absurd theory is exactly how
10:37:51 digital cameras capture. Digital cameras capture an image
10:38:00 by creating a JPEG. That's exactly what Wells Fargo does.
10:38:01 Let's have Slide 30, please.
10:38:04 This answers the question of infringement. The
10:38:07 plain and ordinary meaning of the term covers the system at
10:38:11 issue in this case.
10:38:12 Now, one of the things that was very important to
10:38:14 me was the discussion of Doctrine of Equivalents. And
10:38:18 Professor Conte gave detailed evidence on Doctrine of
10:38:21 Equivalents. He actually marked through -- he actually
10:38:27 marched through each of the elements of the Doctrine of
10:38:29 Equivalents, and let's look at those.
10:38:30 Let's go to Slide 42.
10:38:32 He analyzed whether it's substantially the same
10:38:35 function.
10:38:35 Let's go to Slide 43.
10:38:38 He analyzed whether it's substantially the same
10:38:41 way.
10:38:42 And let's go to Slide 44.
10:38:45 He analyzed whether it's substantially the same
10:38:47 result.
10:38:47 And one of the things that was so interesting
10:38:49 about the argument you just heard is argument is not

10:38:52 evidence. Ask yourself this following question: Did Wells
10:38:56 Fargo's counsel point to you any piece of evidence, any
10:38:58 piece of evidence anywhere in the world that says that what
10:39:02 Wells Fargo do -- does is not equivalent? Not argument,
10:39:06 evidence.
10:39:09 He did not.
10:39:11 Let's go to Slide 52.
10:39:17 I want to talk briefly about willfulness. And
10:39:20 Wells Fargo's counsel said: Well, how can we possibly have
10:39:23 willfully infringed since we only got the screenshots in
10:39:28 2018?
10:39:30 But that's not what the evidence shows. The
10:39:33 evidence shows that there was a continued pattern of access
10:39:38 of USAA's mobile application for years and years and years.
10:39:42 This is a memo. This is PX-0438, in which Paul
10:39:50 Rosati is being asked to go and pull passages from the USAA
10:39:57 application from 2014.
10:40:00 Let's go to Slide 53.
10:40:01 Mr. Rosati admitted it under oath. He admitted
10:40:09 that he went to the USAA mobile application to find
10:40:14 examples of how auto capture worked.
10:40:16 Let's go to Slide 64.
10:40:20 When you think about damages in this case, you
10:40:28 need to think about the scope. There are 231 billion [sic]
10:40:32 checks that have been successfully deposited over this

three-year period using the infringing technology.

And Wells Fargo's counsel made a big point of evidence that this is only damages for three years. And he's absolutely right. There's no shock about it. It was shown in the first slide in our opening. It was shown throughout Mr. Weinstein's deposition -- testimony, and I'll say it now, it's for only three years.

Wells Fargo never has to pay another cent to USAA ever, ever, ever. And they only have to do one thing. They have to flip the switch. And they have chosen not to.

They chose not to after we marked our own product in 2016. They chose not to after we approached them in August of 2018. They chose not to after we sent them a chart showing why they infringed in 2019. They chose not to when we brought this lawsuit. And to this day, this technology which they say is so worthless, turn it off. If it's worthless, turn it off.

Let's go to Slide 64 -- no, let's go to Slide 67. We've talked about the incredible importance of theory of -- that manual capture is a non-infringing alternative. But at -- ultimately, in this case, it's facts that matter. It's not argument.

Mr. Jitodai, who is Wells Fargo's corporate representative, he was authorized to speak on behalf of Wells Fargo on the question of whether manual capture was a

10:42:21 non-infringing alternative.

10:42:23 Question: You can't tell me whether manual capture would have sufficient acceptance rates to be acceptable to customers?

10:42:30 Answer: No.

10:42:32 Dr. Villasenor, question: You have no opinion as to whether it would be commercially viable for Wells Fargo not to offer auto capture, correct?

10:42:48 Answer: That's correct.

10:42:50 Let's go to Slide 69.

10:42:55 Mr. Saffici, who testified that he was an expert in remote deposit capture, said auto capture was essential.

10:43:08 So did Mr. Ajami, the senior VP at Wells Fargo, the person who actually launched auto capture.

10:43:14 In his deposition, under oath, he was asked the question: You have no factual basis to disagree with the Futurion statement that auto capture must now be treated as a much-have -- must-have feature?

10:43:28 Answer: Yeah, I don't think I have any.

10:43:30 And if he did have something after the fact, he could have come here and said it to you, and he didn't.

10:43:36 Let's go to Slide 71.

10:43:42 One of the factors that you're going to have to consider when weighing damages is the expectations of the parties. And, in fact, it's listed in your jury

10:43:51 instructions that you have to consider the expectations of
10:43:54 the parties.
10:43:54 What are the expectations of the parties here?
10:43:57 You heard the deposition of Mr. Easley. Mr. Easley
10:44:01 actually has a very similar position in terms of title to
10:44:07 Ms. Lockwood-Stein. And when he took his -- when his
10:44:10 deposition was taken, he went into great detail listing the
10:44:13 value of the technology to USAA, listing how important it
10:44:16 was to them, in saying: For USAA, we view auto capture as
10:44:22 40 percent of the value of the MRDC system as a whole.
10:44:26 That was his sworn testimony.
10:44:27 Now, Wells Fargo's executives, and there are many
10:44:32 of them, had every opportunity to join the issue -- every
10:44:37 opportunity whatsoever. You didn't hear sworn testimony
10:44:41 from one Wells Fargo executive challenging USAA's position,
10:44:47 not one.
10:44:48 You also didn't hear that testimony from any
10:44:52 technical witness.
10:44:53 Let's go to Slide 60 -- 76.
10:44:56 What you heard it from was Mr. Gerardi. Now,
10:45:03 Mr. Gerardi may be a fine economist, but a technologist, he
10:45:11 is not.
10:45:11 THE COURT: Seven minutes remaining.
10:45:13 MR. SHEASBY: A person who can analyze the
10:45:14 differences and importance of technology is someone else.

10:45:15 That's Mr. Saffici, the RDC expert.

10:45:19 Mr. Gerardi admitted he's not an expert in remote
10:45:23 deposit capture.

10:45:23 Why is someone who's not an expert in remote
10:45:26 deposit capture telling you how much auto capture is worth?
10:45:29 How does that make any sense whatsoever? The answer to the
10:45:33 question is because Wells Fargo's expert in remote deposit
10:45:36 capture, Mr. Saffici, says it's the foundation. And by
10:45:39 saying it's the foundation, he, of course, couldn't
10:45:42 possibly come here to support Wells Fargo's position.

10:45:45 Let's have Slide 77.

10:45:48 Ultimately, the facts will show that MRDC itself
10:45:56 is incredibly valuable technology. And there have been
10:46:01 debates around the side. The idea that Wells Fargo has
10:46:04 generated a billion dollars, given its vastness, from use
10:46:08 of MRDC over the last three years is really not an
10:46:12 incredibly disputed fact. In fact, Mr. Ajami concedes it's
10:46:18 -- it's table stakes.

10:46:19 Let's go to the next slide.

10:46:20 The idea that we're asking for $300 million for
10:46:23 three years is also not shocking. Ms. Lockwood-Stein
10:46:25 admitted that they saved between 60 and $120 million each
10:46:31 year through MRDC. And that's right in the range of what
10:46:36 Mr. Weinstein has indicated.

10:46:37 Next slide.

So the question is: If MRDC is so incredibly valuable, what portion of it is attributed to auto capture?

Now, the Constitution has vested extraordinary power in your hands. But there is wise restraint on that power, and it's called the facts. And the only facts -- let's have the next slide, Slide 80.

The only facts in the record from someone who's qualified to give you that testimony is from Mr. Calman. I'd like Mr. Calman to stand right now.

Mr. Calman told you that the auto capture technology is worth 40 percent of the value of the MRDC.

If there is other qualified technical testimony disputing that fact in the record, I have not found it. And it certainly didn't come from Mr. Gerardi, who is not a technologist.

Let's have Slide 81.

If you apply the 40 percent analysis, you reach $373 million. That's applying Mr. Calman's undisputed facts.

Next slide, please.

But that is only a small portion of the $932 million that is at issue in this case.

Next slide, please.

Even through 330 -- over $300 million has been generated solely by auto capture, Mr. Weinstein -- and I'd

like Mr. Weinstein to stand now -- didn't say we get to keep all of that. He did an analysis of a negotiation. And you know what he did? He said that in the negotiation, Wells Fargo could keep $73 million of the profits that it's generated solely attributed to auto capture from its acts of infringement.

Ladies and gentlemen of the jury, if you award less than $299 million when this case is done, Wells Fargo's lawyers will call back to San Francisco and say: We did it. We made money above our profits by acting and breaking the law.

That's what will happen if you award less than $299 million.

Next slide, please. Let's go to Slide 87 -- 88.

About 13 years ago this month in October of 2006, Mr. Charles Oakes, who is the first head of Applied Research, sent this excited email saying: We have deposited a check using a digital camera. And 13 years later the cycle was closed. He was the first director of Applied Research.

You've heard about Mr. Bueche who was the next director of Applied Research.

This is two generations of research at USAA. This is more than a decade's worth of toil. This is the money of our members in the armed services. This case, this

decade of research, USAA's members, we are in your hands. It's all in your hands.

Ladies and gentlemen of the jury, thank you for your time.

THE COURT: Ladies and gentlemen of the jury, I'd now like to provide you with a few final instructions before you begin your deliberations.

You must perform your duty as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, prejudice, or public opinion.

All parties expect that you will carefully and impartially consider all the evidence, follow the law as I have given it to you, and reach a just verdict regardless of the consequences.

Answer each question in the verdict form from the facts as you find them to be in this case, following the instructions that the Court has included.

Do not decide who you think should win and then answer the questions accordingly. I remind you, ladies and gentlemen, your answers and your verdict in this case must be unanimous.

You should consider and decide this case as a dispute between persons of equal standing in the community, equal worth, and holding the same or similar stations in life. This is true in patent cases between corporations,

partnerships, or individuals.

A patent owner is entitled to protect its rights under the laws of the United States, and this includes bringing a suit in a United States District Court for money damages for infringement.

The law recognizes no distinction among types of parties. All corporations, partnerships, other organizations stand equal before the law regardless of their size and regardless of who owns them, and they are to be treated as equals.

Now, when you retire to the jury room to deliberate on your verdict, as I've told you, you'll each have a copy of these final jury instructions that I'm giving to take with you.

If during your deliberations you desire to review any of the exhibits which the Court has admitted into evidence during the trial, you should advise me by a written note delivered to the Court Security Officer and signed by your foreperson. And I will send that exhibit or those exhibits to you.

Once you retire, you should first select your foreperson and then conduct your deliberations.

If you recess during your deliberations, follow all the instructions the Court has given you about your conduct during the trial.

10:52:43 After you have reached your unanimous verdict,
10:52:46 your foreperson is to fill out those unanimous answers in
10:52:50 the form of the verdict reflecting your unanimous
10:52:54 decisions.
10:52:54 You are not to reveal your answers until such time
10:52:58 as you are discharged as jurors unless otherwise directed
10:53:01 by me. And you must never disclose to anyone, not even to
10:53:05 me, your numerical division on any question.
10:53:08 Any notes that you've taken over the course of the
10:53:11 trial are aids to your memory only. If your memory should
10:53:18 differ from your notes, then you should rely on your memory
10:53:20 and not your notes. The notes are not evidence.
10:53:23 A juror who has not taken notes should rely on his
10:53:27 or her own independent recollection of the evidence and
10:53:29 should not be unduly influenced by the notes of other
10:53:32 jurors. Notes are not entitled to any greater weight than
10:53:35 the recollection or impression of each juror about the
10:53:38 testimony.
10:53:38 If you want to communicate with me at any time
10:53:43 during your deliberations, you should give a written
10:53:47 message or a question written and signed by your jury
10:53:50 foreperson to the Court Security Officer who will bring it
10:53:55 to me. I will then respond as promptly as possible, either
10:53:58 in writing or by having you brought back into the courtroom
10:54:01 where I can address you orally.

10:54:03 I will always first disclose to the attorneys in
10:54:06 the case your question and my response before I answer any
10:54:09 question.
10:54:09 After you've reached a verdict and I've discharged
10:54:14 you from your responsibilities as jurors, you are not
10:54:19 required to talk with anyone about your service in the
10:54:21 case. On the other hand, at that point, you will be
10:54:25 completely free to talk with anyone about your service in
10:54:28 the case. That decision at that time, ladies and
10:54:30 gentlemen, will be yours and yours alone.
10:54:32 I'll now hand eight copies of these final jury
10:54:37 instructions and one clean copy of the verdict form to the
10:54:40 Court Security Officer who will deliver it to you in the
10:54:43 jury room.
10:54:44 Ladies and gentlemen of the jury, you may now
10:54:54 retire to deliberate upon your verdict. We await your
10:54:58 decision.
10:54:59 COURT SECURITY OFFICER: All rise.
10:55:17 (Jury out.)
10:55:18 THE COURT: Counsel, you are welcome to wait for
10:55:25 the jury's verdict here in the courtroom or in the
10:55:27 courthouse. If you choose to be elsewhere, do not be far
10:55:31 away in case we receive a question or when a verdict is
10:55:35 returned.
10:55:35 Pending either a question from the jury or the

10:55:38 return of a verdict, we stand in recess.
10:55:45 MR. SHEASBY: Thank you, Your Honor.
10:55:46 COURT SECURITY OFFICER: All rise.
10:55:47 (Recess.)
12:11:32 (Jury out.)
12:11:33 COURT SECURITY OFFICER: All rise.
12:11:34 THE COURT: Be seated, please.
12:12:13 Counsel, the Court has received the following note
12:12:21 from the jury. I'll read it to you verbatim.
12:12:29 PX-0014
12:12:32 PX-0417
12:12:36 PX-1069
12:12:38 Below that, November 6th, 2019, signed Charles
12:12:42 Harris.
12:12:42 And if I recall correctly, Mr. Harris was Juror
12:12:45 No. 8.
12:12:45 I take this to be a request for the Court to send
12:12:50 these three exhibits to the jury in the jury room. I've
12:12:56 prepared the following response:
12:12:59 Members of the jury, in response to your note,
12:13:01 please find attached the following, PX-14, PX-417, and
12:13:07 PX-1069.
12:13:08 And given the specificity within the note, I've
12:13:13 taken the liberty of pulling those three exhibits from the
12:13:17 Court's file.

12:13:18 Is there any objection to the Court sending these three exhibits with the written response I've read to you to the jury?

12:13:25 MR. SHEASBY: No objections from Plaintiff, Your Honor.

12:13:28 MR. HILL: No objection, Your Honor.

12:13:29 THE COURT: All right. I'll sign the response from the Court, and I'll hand these three exhibits with that signed response to the Court Security Officer and direct him to deliver them to the jury.

12:13:53 I'll hand the original note, which I'm marking in the upper right corner with a 1, to the courtroom deputy for inclusion in the documents in this case.

12:14:04 And, counsel, I have an extra Xerox copy of the note and an extra Xerox copy of my response, which I'll leave with the courtroom deputy. Once I leave the bench, if you'd like to have these copies, you may get them from her.

12:14:20 That being done, and pending either another note or the return of a verdict, the Court stands in recess.

12:14:35 COURT SECURITY OFFICER: All rise.

12:14:37 (Recess.)

12:59:31 (Jury out.)

01:02:20 COURT SECURITY OFFICER: All rise.

01:02:22 THE COURT: Be seated, please.

Counsel, we received a second note from the jury.

I'll read it to you. It reads as follows:

We need a document that shows how Mr. Weinstein arrived at his monetary figures for damages, for cost savings, increased profit, and ecosystem benefits. We don't remember the document number.

It's dated today's date, and signed by Charles Harris as our foreperson.

I will mark the note as No. 2 for identification and deliver it to the courtroom deputy at this time.

Counsel, while you were assembling, I made a quick review of the listed exhibits in the case. I'm persuaded the reason the jury can't remember the number is there is no such exhibit.

I remember Mr. Weinstein's testimony with multiple demonstratives, but I don't think anything that addresses their area of inquiry can be traced to a single admitted exhibit.

I certainly would welcome and solicit any input from counsel if you feel differently or if you agree with that.

MR. SHEASBY: Your Honor, may it please the Court.

I understand that they referenced the word "exhibit," but, of course, there is direct testimony in the record on this subject. And I would respectfully request

that the passages from Mr. Weinstein's testimony, which are the equivalent evidence, be provided to the jury.

THE COURT: Well, I've told the jury throughout this trial that the transcript of the testimony would not be available for them to consider during their deliberations. I've told them the transcript is prepared in case there is an appeal of the decision from this Court to a higher Court.

I'm not about to reverse myself and send in part of the trial transcript that's been produced through the real-time process that but for real-time would not have even begun to be transcribed at this point.

I do have a proposed response to the members of the jury, and I'd like to read it to counsel, and then get your reactions.

Members of the jury, in response to your second note, Mr. Weinstein used several demonstratives during his testimony as he testified and gave opinions on damages. The Court is not aware of an exhibit admitted into evidence which specifically addresses your request. While demonstratives are not evidence, the testimony of a witness using a demonstrative to aid them in giving their testimony is evidence. You will have to rely on your memories of Mr. Weinstein's -- Weinstein's testimony regarding his opinions as to damages and the basis for those opinions.

01:05:21 Anybody object to me sending that response to the
01:05:25 jury?
01:05:25 MR. SHEASBY: Your Honor, one part of concern that
01:05:27 I had is you're not aware of any exhibits relating to
01:05:30 Mr. Weinstein's opinions. There are, of course, exhibits
01:05:33 that do support his opinions.
01:05:36 With respect, would you just give the end of the
01:05:37 instruction that says that you are entitled to rely on his
01:05:40 testimony as evidence? There's some slight subtext of
01:05:45 aspersion that inhabits here. I don't think it was
01:05:49 intentional, but that's how they may interpret it.
01:05:53 THE COURT: Well, what I meant to say,
01:05:55 Mr. Sheasby, was that as to the area they have specifically
01:05:58 requested in their note, I'm not aware of any exhibits that
01:06:01 directly address that inquiry. And if you are, please tell
01:06:06 me. I'm not.
01:06:07 MR. SHEASBY: No, because it was opinion
01:06:09 testimony. So, of course, there would be no exhibits. I
01:06:11 guess I was just respectfully submitting -- without --
01:06:15 would think it would be possible just to say there's no
01:06:17 exhibits, but you may rely on his testimony and
01:06:20 demonstrative exhibits -- there's no single exhibit that
01:06:24 summarizes his calculations, but you may rely on his
01:06:27 testimony.
01:06:28 THE COURT: Well, then the response deleting that

second sentence would read: In response to your second note, Mr. Weinstein used several demonstratives during his testimony as he testified and gave opinions on damages. While demonstratives are not evidence, the testimony of a witness using a demonstrative to aid them in giving their testimony is evidence. You'll have to rely on your memories of Mr. Weinstein's testimony regarding his opinions as to damages and the basis for those opinions.

Does that cure your area of concern?

MR. SHEASBY: It does, Your Honor. Thank you.

THE COURT: Do Defendants have any concern about this response?

MR. MELSHEIMER: I don't believe so, Your Honor. I'm not sure I -- I -- if you would mind reading it from the beginning again just so we could hear it all the way through.

THE COURT: All right. I have it on my laptop here at the bench. I'll read it to you as I have it. It reads as follows from the beginning:

Members of the jury, in response to your second note, Mr. Weinstein used several demonstratives during his testimony, as he testified and gave opinions on damages. While demonstratives are not evidence, the testimony of a witness using a demonstrative to aid them in giving their testimony is evidence. You will have to rely on your

01:08:38 opinions -- excuse me, you'll have to rely on your memories
01:08:40 of Mr. Weinstein's testimony regarding his opinions as to
01:08:43 damages and the basis for those opinions.
01:08:45 Does either party have a problem with me sending
01:08:51 that written response to the jury?
01:08:53 MR. SHEASBY: Nothing from Plaintiffs, Your Honor.
01:08:54 MR. MELSHEIMER: My only concern, Your Honor, is
01:08:56 I'm not - not sure it answers the question that they asked.
01:08:59 They asked for an exhibit, and --
01:09:00 THE COURT: Well, I had an earlier sentence in
01:09:02 here that said I don't find that such an exhibit exists,
01:09:07 but I had an objection from Plaintiff.
01:09:09 MR. MELSHEIMER: Right. I'm just now getting the
01:09:10 chance to -- I'm now responding to that. I think to me,
01:09:11 obviously, Your Honor has got the discretion, but to me,
01:09:14 the most important thing about the questions is that we
01:09:18 answer them, and if you don't answer it and then you
01:09:21 provide some additional information, I think there's a risk
01:09:24 of confusion.
01:09:25 So I think we ought to answer the question and
01:09:29 then if you -- that additional information is to me
01:09:31 surplusage, but I don't -- I don't think it's -- I don't
01:09:35 think it's problematic.
01:09:43 MR. SHEASBY: Your Honor, what if we said there's
01:09:46 no one exhibit that summarizes his opinions? The only

01:09:57 concern I have is I don't want it to be suggested that
01:10:01 there was an exhibit that supported his opinions. That was
01:10:12 my only concern.
01:10:12 MR. MELSHEIMER: I don't want to interrupt the
01:10:13 Court while you're thinking, Judge.
01:10:20 THE COURT: I'll try again, and I'm trying to go
01:10:45 the second mile to get input from both sides in hopes that
01:10:49 we can reach a point where no one has any discomfort with
01:10:54 my response, understanding it's not a negotiation at the
01:10:57 end of the day. I'll eventually just give the response I
01:11:00 think the note calls for.
01:11:02 MR. SHEASBY: I understand, Your Honor.
01:11:04 THE COURT: Here's what I have in the current
01:11:06 iteration of the response, and I'll read it for the benefit
01:11:08 of counsel.
01:11:09 Members of the jury, in response to your second
01:11:11 note, Mr. Weinstein used several demonstratives during his
01:11:15 testimony as he testified and gave opinions on damages.
01:11:18 Neither the parties nor the Court are aware of a single
01:11:23 exhibit admitted which specifically addresses your request.
01:11:27 While demonstratives are not evidence, the testimony of a
01:11:30 witness using a demonstrative to aid them in giving their
01:11:33 testimony is evidence. You will have to rely on your
01:11:36 memories of Mr. Weinstein's testimony regarding his
01:11:38 opinions as to damages and the basis for those opinions.

01:11:43 MR. MELSHEIMER: Your Honor, I would object to anything after "while demonstratives." I don't -- I don't -- that seems to be adding something that they haven't asked about, and, of course, it's the Plaintiff's burden to point out the evidence and to point out things. It seems like --

01:11:57 THE COURT: I've already instructed them, Mr. Melsheimer, that demonstratives are not evidence, but the testimony of a witness using a demonstrative is evidence. I'm just merely repeating a portion of my final instruction to them.

01:12:08 MR. SHEASBY: Your Honor, I think we'd be fine with that with one request, that there be no single exhibit that summarizes all of his opinions.

01:15:02 THE COURT: Mr. Sheasby, if you and Mr. Melsheimer would approach, I'll hand you a written draft of the note as I have it now. I will take five minutes and let the two of you consult, and then I'll see if you have an agreement as to a response the Court should send the jury.

01:15:20 Barring an agreement, I intend to send this response to the jury.

01:15:24 MR. SHEASBY: Thank you.

01:15:25 MR. MELSHEIMER: Thank you.

01:15:26 THE COURT: The Court stands in recess.

01:15:28 COURT SECURITY OFFICER: All rise.

01:15:29 (Recess.)

01:24:58 (Jury out.)

01:24:59 COURT SECURITY OFFICER: All rise.

01:25:00 THE COURT: Be seated, please.

01:25:21 Is there any unanimity among counsel as to the
01:25:28 contents of this written response?

01:25:29 MR. SHEASBY: Plaintiffs does not object to the
01:25:32 response, Your Honor.

01:25:32 MR. MELSHEIMER: Your Honor, I understand you're
01:25:33 giving this, if we don't agree, I maintain my objection to
01:25:38 the text that starts "as I have told you," but I understand
01:25:42 the Court's going to give this instruction.

01:25:43 THE COURT: So your -- your objection,
01:25:44 Mr. Melsheimer, is that that is duplicative, or what's the
01:25:47 legal basis of your objection?

01:25:48 MR. MELSHEIMER: The legal basis is it's
01:25:50 unnecessary, and it is repeating instructions that are
01:25:55 already in the Court's instruction directing them to
01:25:59 something that's already in there, and it goes beyond the
01:26:01 question. That's -- that's my --

01:26:03 THE COURT: All right.

01:26:03 MR. MELSHEIMER: That's my form objection. Thank
01:26:06 you, Your Honor.

01:26:06 THE COURT: All right.

01:26:09 MR. MELSHEIMER: But I understand, we don't want

to waste any more time about this.

THE COURT: All right. For the record, I'm going to read the response, which I've signed and which I will send in by the Court Security Officer to the jury.

This is entitled Response to Note No. 2 dated November the 6th, 2019. Below that, it begins as follows.

Members of the jury, in response to your second note, Mr. Weinstein used several demonstratives during his testimony as he testified and gave opinions on damages. Neither the parties nor the Court are aware of any single exhibit which specifically addresses your written request as set forth in your second note to the Court. As I have told you, while demonstratives are not evidence, the testimony of a witness using a demonstrative to aid them in giving their testimony is evidence. Accordingly, you will have to rely upon your memories of Mr. Weinstein's testimony regarding his opinions as to damages and the basis for those opinions.

I'll hand a signed version of this to the Court Security Officer and direct her to deliver it to the jury.

I'll also deliver a signed copy of the same to the courtroom deputy for inclusion in the papers of this case.

Pending either another note from the jury or the return of a verdict, we stand in recess.

COURT SECURITY OFFICER: All rise.

01:28:02 MR. SHEASBY: Thank you, Your Honor.
01:28:04 (Recess.)
02:03:03 (Jury out.)
02:03:06 COURT SECURITY OFFICER: All rise.
02:03:07 THE COURT: Please be seated.
02:04:10 Counsel, I've received the following note from the
02:04:23 jury delivered by the Court Security Officer. It reads as
02:04:27 follows:
02:04:28 We have reached a verdict.
02:04:30 It's dated today's date, November the 6th, 2019.
02:04:34 And it's signed by Charles Harris.
02:04:36 I'll hand this note to the courtroom deputy for
02:04:39 the inclusion in the documents related to this case.
02:04:43 I will also tell, counsel, that when that note was
02:04:45 brought to me by the Court Security Officer, she advised
02:04:48 that the jury requested a clean copy of the verdict form,
02:04:51 and I gave her a clean copy of the verdict form, which she
02:04:54 took back to the jury. I instructed her to have the
02:04:57 earlier version torn up and thrown away.
02:05:01 So I expect they will bring a clean copy of the
02:05:05 verdict form into the courtroom without any interlineations
02:05:11 or any corrections. I thought it was easier to send a
02:05:15 clean copy of the verdict form for that purpose to them
02:05:18 than to have them bring in the form with an interlineation
02:05:22 or correction on the face of the verdict form. I'm simply

02:05:26 disclosing that to you.
02:05:27 All right. Is there anything that we need to take
02:05:29 up before I bring in the jury and receive the verdict?
02:05:32 Anything from the Plaintiff?
02:05:33 MR. BUNT: No, Your Honor.
02:05:34 THE COURT: Anything from the Defendant?
02:05:35 MR. MELSHEIMER: No, Your Honor.
02:05:36 THE COURT: I'll remind those present that the
02:05:39 Court does not expect any outbursts or audible comments one
02:05:45 way or the other once I read the verdict. I'll expect the
02:05:50 same decorum that's been maintained throughout the trial.
02:05:54 All right. If you'll bring in the jury, please.
02:05:56 COURT SECURITY OFFICER: All rise.
02:05:57 (Jury in.)
02:05:58 THE COURT: Please be seated.
02:06:21 Mr. Harris, it's my understanding that you are the
02:06:28 foreperson of the jury; is that correct?
02:06:30 THE FOREPERSON: Yes, Your Honor.
02:06:31 THE COURT: Has the jury reached a unanimous
02:06:33 verdict?
02:06:33 THE FOREPERSON: We have, Your Honor.
02:06:34 THE COURT: Would you hand the completed verdict
02:06:36 form to the Court Security Officer who will bring it to me?
02:06:39 Ladies and gentlemen of the jury, I'm about to
02:07:26 announce your verdict at this time into the record. I'm

02:07:29 going to ask each one of you to listen particularly
02:07:32 carefully because after I've announced the -- the verdict
02:07:37 publicly and into the record, I'm going to ask each of you
02:07:40 if this is your verdict, so that we can confirm on the
02:07:43 record that it is, in fact, the unanimous decision of all
02:07:45 eight members of the jury.
02:07:47 Turning to the verdict form and proceeding to Page
02:07:54 4 where the first question posed to the jury is found.
02:08:00 Question No. 1, did USAA prove by a preponderance
02:08:04 of the evidence that Wells Fargo infringed any of the
02:08:06 asserted claims?
02:08:07 The answer is: Yes.
02:08:09 Turning to Page 5 wherein Question 2 of the
02:08:15 verdict form is found.
02:08:18 Question 2, did USAA prove by a preponderance of
02:08:21 the evidence that Wells Fargo willfully infringed any of
02:08:25 the asserted claims that you found were infringed?
02:08:28 The answer is: Yes.
02:08:30 Turning to Page 6 where the third and final
02:08:35 question presented to the jury is found.
02:08:37 Question 3: What sum of money, if any, paid now
02:08:41 in cash has USAA proven by a preponderance of the evidence
02:08:45 would compensate USAA for its damages resulting from
02:08:49 infringement through the day of trial?
02:08:50 The jury's answer in dollars and cents is $200

million.

Turning to Page 7, which is the final page of the verdict form, I find that it is dated with today's date, November the 6th, 2019, and it's signed by Mr. Charles Harris as foreperson of the jury.

Ladies and gentlemen of the jury, let me poll you at this time to make sure that this verdict, as I've read it into the record, is the unanimous decision and verdict of all eight members of the jury.

If this is your verdict as I have read it, would you please stand.

(Jury polled.)

THE COURT: Thank you, ladies and gentlemen. Please be seated.

Let the record reflect that all eight members of the jury immediately rose and stood in response to the Court's question to poll the jury. I find that this is the unanimous verdict of all eight members of the jury.

Ladies and gentlemen, this now completes the trial of this case. From the very beginning, I've instructed you many times about not discussing this case or communicating about it in any way until you retired to deliberate and only then to discuss it among yourselves.

I'm now releasing you from that obligation and all your obligations as jurors. I'm discharging you from your

responsibility as jurors in this case. This means you're free to talk about your jury service with anyone that you would like to. This also means you're free not to talk about your jury service with anyone of your choosing. The choice is yours 100 percent.

I will explain to you that the practice and custom in this court going back at least 30 years, because it's the way it was when I started practicing law, was that when the jury returned a verdict and left the courthouse, the lawyers could position themselves on the front sidewalk so that if the jury wanted to stop and talk to them, they could do so.

But the lawyers are prohibited from initiating conversation with you. As you leave the building and exit the front doors, if you see any of the lawyers and if you want to stop and talk about your service, I'm sure they would be happy to hear any comments you have. You are not required to do that. And if it is your choice not to stop and discuss the case and your service with -- your service as jurors in this case, then all you have to do is simply walk straight past them, go to your vehicles, do whatever you want to do. They will not stop you. They will not initiate a conversation with you.

Also, I want you to know that recently, I've started an additional practice in this regard. I've asked

for and gotten a representative cell phone number from a lawyer for each the Plaintiff and for the Defendant. I'm going to give you those cell phone numbers in a few minutes. You can take them with you if you want them. You don't have to take them with you. But if over the next week or several weeks you would prefer to initiate a conversation by calling one or more of these lawyers on a cell phone, you'll have a cell phone number for both Plaintiff and Defendant that you can use for that purpose. You're under no obligation to do that.

And if no one -- if anyone related in this case never hears from you again, that will be perfectly fine. It is your choice 100 percent. I want to make that clear to you.

Also, ladies and gentlemen, I want to let you know how much the Court appreciates your service in this case. You have each rendered very real and important public service. You have done your duty as Americans to uphold the guarantees of our Constitution, specifically the Seventh Amendment and its guarantee of the right to a jury trial in a civil dispute such as this one. You've each sacrificed to be here. And what you've done is worthy of recognition and appreciation and thanks.

I speak for everyone in this courtroom -- I'm confident I speak for everyone in this courtroom when I say

all of us appreciate and value what you've done by serving as jurors in this case. I have watched you throughout this trial. You have paid close and careful attention from the very beginning until right now as I'm speaking to you. There's never been a point when I noticed any of you not focused, not listening, not carefully paying attention, many of you taking copious notes throughout the process. You have each done your duty and you are each to be proud and to be thanked for what you've done.

I have a practice since I've been on the bench and it involves me asking you a favor, and that is, though I've discharged you as jurors, I'm going to request that as a personal favor to me when you get up in a moment that instead of leaving the courtroom, you go back into the jury room and let me come into the jury room for just a moment.

I'd like the privilege of shaking each of your hands, and telling you face-to-face how much the Court appreciates the service that you've rendered as jurors in this case.

I promise I will not keep you long. But I think what you've done warrants that kind of personal thanks and expression of appreciation on behalf of the Court. If you would do me that favor, I would very much appreciate it.

As I said, ladies and gentlemen, you are discharged as jurors. And I will see you in the court --

in the jury room in just a moment.

COURT SECURITY OFFICER: All rise.

(Jury out.)

THE COURT: For the record, I will hand the verdict form to the courtroom deputy.

Counsel, this completes the trial of this case. The Court accepts the jury's verdict, and you are excused.

MR. SHEASBY: Thank you, Your Honor.

MR. MELSHEIMER: Thank you, Your Honor.

COURT SECURITY OFFICER: All rise.

(Court adjourned.)

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes 11/6/19
SHELLY HOLMES, CSR, TCRR Date
OFFICIAL REPORTER
State of Texas No.: 7804
Expiration Date: 12/31/20